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NO.

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner,*

v.

JOHN DAVID STUMPF, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3613

John David Stumpf,
Petitioner-Appellant,
v.
Betty Mitchell, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus

No. 96-00668

George C. Smith, District Judge

Argued December 11, 2002
Decided and Filed April 28, 2004

Before: BOGGS, Chief Judge; and DAUGHTREY and MOORE, Circuit Judges. DAUGHTREY, J., delivered the opinion of the court, in which MOORE, J., joined. BOGGS, C.J. (pp. 44-52), delivered a separate dissenting opinion

COUNSEL

ARGUED: Alan M. Freedman, MIDWEST CENTER FOR JUSTICE, Chicago, Illinois, for Appellant. Carol Ann Ellensohn, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee. ON BRIEF: Alan M. Freedman, Carol Heis, MIDWEST CENTER FOR JUSTICE,

Chicago, Illinois, for Appellant. Stephen E. Maher, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The petitioner, John David Stumpf, is a state prisoner incarcerated on Ohio's death row. He appeals the district court's dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in which he challenged his 1984 guilty plea and death sentence for one count of aggravated murder, with the capital specification that the murder was committed to escape detection, apprehension, trial, and punishment for other offenses, including aggravated robbery and attempted aggravated murder. Specifically, Stumpf alleges (1) that his guilty plea was involuntary and unknowing; (2) that his due process rights were violated by the state's use of inconsistent theories to secure convictions against both Stumpf and his accomplice, Clyde Wesley; (3) that he was deprived of effective assistance of counsel at sentencing; and (4) that the Ohio death penalty statute is unconstitutional on its face and as applied to him.

Prior to entering a guilty plea, Stumpf had waived his right to a trial by jury and elected to have his case heard by a three-judge panel. Under Ohio law, when a defendant pleads guilty to aggravated murder, the court must hold an evidentiary hearing to establish a factual basis for the plea. The three-judge panel held such a hearing in this case and found that there was a factual basis for Stumpf's plea, that he was guilty of aggravated murder with the capital specification

and, ultimately, that there was insufficient mitigating evidence to spare Stumpf from imposition of the death penalty.

Under Ohio law at the time of Stumpf's conviction, the aggravated murder statute required that "specific intent" be proved to convict someone of that crime. At the evidentiary hearing to establish a factual basis for Stumpf's plea, Stumpf and his attorneys argued that he did not shoot the victim and, indeed, that he was not present when the victim was shot. The state argued in response that Stumpf was the shooter, and the three-judge panel that heard the case adopted the state's theory, finding that Stumpf was the actual shooter. At a later trial of Stumpf's accomplice Wesley, however, the state presented the testimony of a jailhouse informant to establish that Wesley was the shooter. When Stumpf sought to withdraw his guilty plea on the basis of Wesley's conviction, the state opposed his motion, arguing that the informant's testimony was unreliable.

We conclude that the district court should have granted relief to Stumpf on either or both of two alternative grounds: first, that his guilty plea was unknowing and involuntary because he was manifestly not aware that specific intent was an element of the crime to which he pleaded guilty and, second, that Stumpf's due process rights were violated by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories. Because we are granting relief on these two grounds, we do not reach Stumpf's challenge to the effectiveness of counsel's representation at sentencing or to the constitutionality of the Ohio death penalty statute.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. The District Court's Factual Findings

Most of the underlying facts are undisputed in this case and do not affect the legal determinations necessary to the resolution of the appeal. For that reason, and because we review the district court's determination of the facts only for clear error, we adopt the district court's characterization of the facts, as determined by the state courts, as follows:

> On May 14, 1984, Stumpf, Clyde Daniel Wesley, and Norman Leroy Edmonds, after visiting a bar in Washington, Pennsylvania, got on Interstate 70 and headed west toward Ohio. By sundown, they had reached Guernsey County. They stopped their car along I-70 and, leaving Edmonds in the car, Stumpf and Wesley walked to a nearby house under the pretense of needing to make a phone call. The house they chose was owned and occupied by Norman and Mary Jane Stout. Stout admitted Stumpf and Wesley into his home and allowed them to use the phone. When they had completed the call, both Stumpf and Wesley produced pistols and announced a robbery. n1 Stumpf held the Stouts at gunpoint in a back bedroom while Wesley searched the house for items to steal.
>
> At some point, Stout moved toward Stumpf, and Stumpf shot him between the eyes with his pistol. The shot was not fatal, and Stout subsequently pushed Stumpf into the next room. During this altercation, Stout was struck on the head with a pistol and shot in the head a second time. These actions were enough to render him semi-conscious but not to kill him. While lying on the floor in the

> other room, Stout heard four gunshots. There is no dispute that Mary Jane Stout was shot and killed during the course of this robbery, although there is a dispute as to whether Stumpf or Wesley fired the fatal shots. After Mrs. Stout was killed, Stumpf and Wesley stole the Stout's car and fled. Stumpf was arrested several days later, and after initially denying any knowledge about these crimes and then being told that Stout had survived, he confessed to being involved.
>
> At the time the trial court proceedings occurred, Wesley had not yet been extradited from Texas. However, subsequent to Stumpf's having pleaded guilty and having been sentenced to death, Wesley was convicted of aggravated murder by a jury and received a sentence of life imprisonment without the possibility of parole for 20 years. The State introduced evidence at Wesley's trial that Wesley and not Stumpf fired the shots that killed Mrs. Stout. Edmonds was not charged in the Stout murder and robbery, but was charged for other offenses committed during this crime spree, and he agreed to and did testify against both Stumpf and Wesley concerning the murder of Mary Jane Stout.

Stumpf v. Anderson, No. C-1-96-668 (S.D. Ohio Nov. 9, 1999).

> n1 Wesley and Stumpf had carried Edmonds's chrome Raven and Wesley's black .25 caliber pistol with them into the house.

B. Additional Facts Regarding Ballistics Evidence

Of the two bullets that struck Stout, only pieces of each were recovered. Part of the bullet that struck him between the eyes was recovered during surgery, while a second fragment

was found in the second bedroom. A portion of the bullet that struck Stout in the top of the head was recovered during surgery, but part of it had to be left in place. Another bullet was recovered from the mattress of the second bedroom.

Stout's wife was shot four times in the first bedroom. She died from three gunshots to the left side of her head. The fourth bullet went through her left wrist and struck her chest without penetrating the skin of her chest. A fifth bullet was recovered from the wall of that bedroom, above the headboard of the bed.

The chrome Raven was never recovered by the police, and Stumpf admitted that he had thrown it out of the car window after he and Wesley had left the Stout residence. The black .25 caliber pistol was recovered by the police after the men sold it, along with one of Stout's guns, to an individual in Washington, Pennsylvania. Ronald Dye, a ballistics expert from the Ohio Bureau of Criminal Identification and Investigation, a division of the Ohio Attorney General's office, testified at Stumpf's factual basis hearing as to the forensic findings regarding bullets and cartridge cases recovered from the murder scene. Dye testified that there were eight spent cartridges found at the scene, that seven of them had been fired by one gun, and one was fired by a different gun. Dye also said that the black pistol, which had been recovered by the police, fired one bullet, while the other seven bullets were all fired by the same gun. That gun could have been the chrome Raven, or one of several other types of guns.

At Stumpf's plea proceeding, the prosecutor argued that the ballistics evidence supported the conclusion that Stumpf had shot Mrs. Stout, since she was apparently shot with the same weapon used against her husband, saying, "There's ample evidence to conclude that this defendant fired all shots that hit anybody, because the same gun fired all of those

shots." However, during Wesley's trial, the same prosecutor put Eastman, Wesley's cellmate, on the witness stand, to repeat Wesley's confession to him. According to Eastman, Wesley told him that after Stumpf had shot Stout in the face, he dropped the chrome Raven and ran, at which point Wesley picked up the pistol and shot Mrs. Stout. This version of the crime was also supported by the ballistics evidence that the black pistol had a tendency to jam after firing just one round, which may have led Wesley to discard it after shooting it only once.

C. The Guilty Plea

Stumpf and Wesley could not be tried together because Wesley contested his extradition from Texas, where he had been apprehended. As a result, while Wesley was still detained in Texas, Stumpf pleaded guilty to the aggravated murder of Mary Jane Stout, in violation of Ohio Rev. Code § 2903.01(B), and to the capital specification under Ohio Rev. Code § 2929.04(A)(3) that the murder was committed for the purpose of escaping detection, apprehension, trial or punishment for the offenses of the aggravated robbery of the Stouts. He also pleaded guilty to the attempted aggravated murder of Norman Stout and to a firearms specification for each count. Subsequent to the entry of his plea, the prosecutor notified the trial judge that a plea agreement had been reached. Stumpf was questioned about the agreement at some length, as detailed below.

D. The Evidentiary Hearing

Under Ohio law, the trial court must conduct an evidentiary hearing in all aggravated murder cases involving guilty pleas, to determine whether there is a factual basis for

the plea. Following Stumpf's entry of a waiver to have a jury hear the evidence, the hearing commenced before a three-judge panel.

During the factual basis hearing, the prosecution argued that Stumpf had shot Mrs. Stout, while the defense argued that Mrs. Stout was shot by Wesley, not by Stumpf. The three-judge panel found Stumpf "guilty beyond a reasonable doubt" of count one of the indictment (aggravated murder of Mary Jane Stout), along with specification one (that she was killed to escape detection for the crimes of aggravated robbery and attempted aggravated murder) and specification four (firearm), and guilty of count two of the indictment (attempted aggravated murder of Norman Stout), with its firearm specification.

E. The Mitigation Hearing

The mitigation hearing was held one day after the conclusion of the evidentiary hearing, lasted less than two days, and consisted of the presentation of 15 witnesses for the defense—primarily some of Stumpf's friends and family members and a few former employers and teachers—and of an unsworn statement by Stumpf himself. Defense counsel presented no expert witnesses, beyond a parole officer and a court clerk who testified as to Stumpf's lack of a significant criminal history. The general defense strategy was to show that Stumpf had a generally good nature, lacked a violent temper, had a fairly steady work history but a limited education, had a difficult home environment, and was respectful towards women. Stumpf's unsworn statement recounted his version of the crime and emphasized that Wesley, and not Stumpf, had shot Mary Jane Stout.

Following the hearing, the three-judge panel sentenced Stumpf to death, finding that he had established only two

mitigating factors: his age (23) and his lack of a significant criminal background.

F. Appellate Procedural History

After Stumpf's conviction, and while his direct appeal was pending, Clyde Wesley was also convicted, by a jury, of Mary Jane Stout's murder. As a result, Stumpf filed a motion for leave to withdraw his guilty plea or, in the alternative, to have the trial court set aside his death sentence and grant him a new sentencing hearing. The motion was summarily denied by two of the three judges who had heard his case at the trial level (the third judge had died in the interim), and the Ohio Supreme Court affirmed the order at the same time it affirmed Stumpf's conviction on direct appeal.

Stumpf then filed a petition for post-conviction relief in state court, raising challenges to the validity of his jury trial waiver and the effectiveness of trial counsel's representation, particularly with regard to counsel's advice to Stumpf that he would not receive the death penalty if he pleaded guilty. In the petition, Stumpf requested an evidentiary hearing and submitted multiple affidavits in support of his claims. The trial court dismissed the petition without an evidentiary hearing, and this decision was affirmed by the Ohio Court of Appeals. The Ohio Supreme Court dismissed the appeal, see *State v. Stumpf*, 56 Ohio St. 3d 712, 565 N.E.2d 835 (Table)(Ohio 1990), and the United States Supreme Court subsequently denied certiorari. See *Stumpf v. Ohio*, 502 U.S. 956, 116 L. Ed. 2d 435, 112 S. Ct. 415 (1991).

Stumpf next filed a petition for a writ of habeas corpus in federal court, alleging as grounds for relief that the Ohio Death Penalty statute is unconstitutional, both as written and as applied to Stumpf; that his guilty plea was not knowing and intelligent; that his waiver of the right to a jury trial was invalid; that he received ineffective assistance of counsel at

the penalty phase; that he was not permitted to be present at his motion for a new trial; that the trial court improperly considered non-statutory aggravating circumstances and ignored substantial mitigating evidence when deciding his sentence; that the trial court erred in denying his motion to vacate his sentence or withdraw his guilty plea based on newly discovered evidence; that consideration of post-sentence proceedings by less than the entire three-judge panel violated his due process rights; and that the trial court erred by failing to follow an Ohio statutory requirement that the court produce a meaningful written analysis of the mitigation evidence as a basis for imposing a death sentence.

The district court issued two opinion and orders. The first found that several of petitioner's claims had been procedurally defaulted, see *Stumpf v. Anderson*, No. C-1-96-668 (S.D. Ohio Nov. 9, 1999); the second denied relief on the remaining claims, see *Stumpf v. Anderson*, No. C-1-96-668 (S.D. Ohio Feb. 7, 2001). However, the district court did grant a certificate of appealability on the following five issues: (1) whether the statutory provisions governing Ohio's capital punishment scheme violate the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*, either on their face or as applied to Stumpf; (2) whether Stumpf's guilty plea was knowing, intelligent and voluntary; (3) whether Stumpf received the ineffective assistance of counsel at the penalty phase of his trial; (4) whether Stumpf's due process rights were violated when the trial court failed to vacate his sentence or allow him to withdraw his plea based on newly discovered evidence; and (5) whether Stumpf received the ineffective assistance of appellate counsel. Before us, Stumpf has pressed the first four claims but has abandoned the claim that appellate counsel was ineffective.

II. STANDARD OF REVIEW

Because Stumpf's federal habeas petition was filed in November 1995, the amendments to 28 U.S.C. § 2254 contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) do not apply to this case. See *Lindh v. Murphy*, 521 U.S. 320, 336, 138 L. Ed. 2d 481, 117 S. Ct. 2059)(1997) (finding that AEDPA changes do not apply to cases pending at the time of AEDPA's enactment on April 24, 1996). Stumpf's claims, therefore, must be evaluated under § 2254(d) as it existed prior to the enactment of AEDPA.

Accordingly, we review the district court's disposition of a petition for writ of habeas corpus *de novo*, although the district court's factual findings are reviewed only for clear error. *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). We also defer to the state court's factual findings, which may be rebutted only by "clear and convincing evidence." *Id.* However, this deference only applies to "basic, primary facts" and not to mixed question of law and fact, which are subject to *de novo* review. *Id.*

III. ANALYSIS

A. The Validity of the Petitioner's Guilty Plea

The Supreme Court has held, in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), that when a defendant enters a guilty plea, the state bears the burden of showing that the plea was voluntary, intelligent and knowing. Determining whether a plea is voluntary, intelligent and knowing requires an analysis of the totality of the circumstances. *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). When a defendant brings a federal habeas petition challenging his plea, the state generally satisfies this burden by producing a transcript of the plea proceeding. *Garcia*, 991 F.2d 324, 326. A state court finding that the plea was proper

is accorded a presumption of correctness, unless the transcript of the plea proceeding is inadequate to demonstrate that the plea was voluntary, intelligent and knowing. *Garcia* at 326-27; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), *overruled on other grounds by Parke v. Raley*, 506 U.S. 20, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992).

The proper standard of review in this case, then, turns on whether the record of state court proceedings surrounding Stumpf's guilty plea "leaves doubt as to whether the plea was in fact intelligent and voluntary." *Dunn*, 877 F.2d at 1277 (citing *Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cir. 1975)). If the record does leave doubt as to whether the plea was voluntary, intelligent and knowing, and the defendant argues that it was not, the State bears the burden of proving the contrary. *Id.* (citing *Boykin*, 395 U.S. at 243).

Although Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime to which he pleaded guilty, this argument is inherent in the fact that he continually professed his innocence of committing the actual shooting both during and after the guilty plea. The record reflects, for example, his expectation that he would be given an opportunity to present evidence to the three-judge panel relevant to his conduct. Moreover, the record indicates that the explicit statutory requirement of intent was never explained to Stumpf during the plea colloquy. Furthermore, although his attorneys represented to the court that they had explained to Stumpf the elements of the crime, their own arguments to the court during the plea colloquy and the evidentiary hearing to establish a factual basis for the plea refute the typical presumption that defense counsel have fully and adequately explained all elements of a crime to a client before he pleads guilty. Indeed, defense counsel's representations to the court either betray their own ignorance of the intent element of aggravated murder, or represent a

woefully inadequate understanding of the meaning of a guilty plea. Finally, the plea colloquy itself, along with Stumpf's statements to the court through all stages of the proceedings, demonstrates Stumpf's unwillingness to admit to intent.

At the time of Stumpf's crime and subsequent conviction, Ohio's aggravated murder statute specified that specific intent was a necessary element of aggravated murder. The statute read as follows:

> § 2903.01 Aggravated murder.
>
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while fleeing immediately after committing or attempting to commit kidnapping [sic], rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
>
> Ohio Rev. Code § 2903.01 (1984) (amended 1996). n2
>
> n2 Ohio Rev. Code § 2903.01 was amended on July 1, 1996. Section (D) was removed and replaced with additional descriptions of aggravated murder. See Ohio Rev. Code § 2903.01 (2002).

Stumpf was convicted under § 2903.01(B), which, although it specifies that the murder must be caused "purposely," does not specifically require intent. However,

subsection (D) of the same statute clarifies that intent is indeed a necessary element of aggravated murder:

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . .

Ohio Rev. Code § 2903.01 (1984) (amended 1996). Furthermore, the statute limits fact-finders from inferring specific intent solely from an accused's participation in a felony murder:

> In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of or attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive,

> that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed . . . .

Ohio Rev. Code § 2903.01(D) (1984) (amended 1996). Finally, the fact-finder must also be instructed that "the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." Ohio Rev. Code § 2903.01(D) (1984) (amended 1996). Read together, these provisions indicate that specific intent may not be inferred solely from the fact of participation in a felony murder but must be established explicitly by the prosecution.

Ohio courts have confirmed this interpretation of the statute. In *In re Washington*, 81 Ohio St. 3d 337, 1998 Ohio 627, 691 N.E.2d 285, 287 (Ohio 1998), the Supreme Court of Ohio considered an appeal regarding whether there was sufficient evidence to support the specific intent requisite for an aggravated murder conviction, in a case in which the murder was committed in the course of a robbery. As the court explained: "Washington cannot [be found guilty of] aggravated murder based solely on his complicitous actions. It is also necessary for the state to establish that Washington acted with the kind of culpability required of the commission of aggravated murder." *Id.* In this particular case, the court found that there was sufficient evidence for the trial court to conclude that Washington had acted with the requisite intent, because the trial court inferred intent only after "hearing and considering all the evidence" instead of presuming intent based on Washington's participation in the robbery. *Id.*

Here, the record of the plea proceeding clearly demonstrates that the defendant did not possess an

understanding of the aggravated murder charge to which he pleaded guilty. Although the district court ultimately concluded that the state court record was suggestive of a knowing and voluntary plea, it did concede that the plea proceeding was "not a picture of clarity." We agree, and we note that this "lack of clarity" first surfaced at the moment the prosecutor informed the court that a plea agreement had been reached. He gave the following account of the agreement:

> SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first court, the Aggravated Murder, was [committed] for the purpose of escaping detection, apprehension, trial or punishment for other offenses—the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder." If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of—excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to

> the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.
>
> That is my understanding of the arrangement that we are proposing to the Court at the present time. n3
>
> n3 The plea agreement also merged specification four of count one, and specification one of count two. That is, both gun specifications were to be treated as part of the same offense for sentencing purposes.

Reviewing this portion of the trial court record, the district court commented that "the prosecuting attorney's explanation of the plea agreement was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered—especially if advised by counsel to do just that." But the trial court in this case, rather than attempting to elucidate the prosecutor's

explanation for the defendant, immediately turned to the defendant for verification of the prosecutor's account of the plea agreement. As the record reveals, even at this stage in the plea agreement, the defendant appeared to be unable to follow the proceedings:

> JUDGE HENDERSON: Thank you, Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Tingle?
>
> TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.
>
> JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to be asked, I'm going to ask that question now. Stumpf, do you affirmatively acknowledge this agreement?
>
> STEPHENS: Would you repeat the question for him Your Honor?
>
> JUDGE HENDERSON: Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

> THE DEFENDANT: Yes, sir.

Obviously, not every ambiguity in a plea proceeding, without more, will demonstrate that a plea is not "knowing and intelligent." However, the exchange set out above turned out to be merely the beginning of much confusion that was to follow. After allowing amendment of the indictment, the court conducted a plea colloquy, examining first the defense attorneys, and then the defendant:

> JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that question be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?
>
> TINGLE: We have, Your Honor.
>
> JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?
>
> TINGLE: Yes, we have.

After his attorneys indicated that they had explained the elements of the crime to their client, Stumpf was sworn in for

the limited purpose of answering questions concerning his guilty plea, and affirmed his attorney's statements, as follows:

> JUDGE HENDERSON: Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?
>
> THE DEFENDANT: Yes, sir.

> JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?
>
> THE DEFENDANT: Yes, sir.

Judge Henderson next questioned Stumpf as to his physical and mental health, and whether he was presently under the influence of drugs or alcohol. He then went over the crimes to which Stumpf was pleading guilty. The following is a complete account of his explanation to the defendant:

> JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being—to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and

the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the—under specification four to the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the Attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

As indicated below, Stumpf has a low IQ and has been found to be mentally and emotionally immature. Nevertheless, the trial court never inquired into Stumpf's ability to understand the guilty plea proceedings or the nature of the charges against him. The explanation set out above is the only account of the crimes provided to Stumpf by the court. Nowhere does the court explain the elements, or even read the charges as listed in the indictment. n4

n4 Stumpf did initial the interlineation amendment to the indictment during the plea hearing, but there is no indication in the record that he had actually read the indictment at any point or that it had been read to him. Moreover, we conclude that use of the term "purposely" is not sufficient to put the defendant on notice that specific intent, which is expressly more than intent implied from participation in a felony, is a required element of aggravated murder.

Judge Henderson then proceeded to question Stumpf about the rights he was surrendering by pleading guilty. The exchange went as follows:

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proved guilty beyond a reasonable doubt; the right to confront and to question the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you

understand that you may be giving up those rights?

STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. *He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence* and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Stephens. Of course *in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf.* My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

STEPHENS: Yes, sir.

We read this exchange to reflect a misunderstanding between attorney Stephens and Judge Henderson. Stephens, answering for Stumpf, asserted the defendant's right to present evidence during "a hearing or trial relative to the underlying facts" of the case. He was plainly referring to the factual basis hearing and asserting the defendant's wish to challenge the state's version of the facts. Judge Henderson indicated in response that the defendant could present evidence during "the sentencing portion of this trial," apparently referring to the mitigation phase. In any case, this was the first indication that the defendant did not wish to concede the state's version of the facts. The parties next

discussed a prior suppression hearing, and then the court resumed questioning Stumpf:

JUDGE HENDERSON: Do you understand, Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty that Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

STEPHENS: One moment, Your Honor. *Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.*

JUDGE HENDERSON: At no time am I implying that the defendant will not have *the right to present evidence in mitigation hearing* and I do appreciate it, Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

The Defendant: Yes, sir.

Again, the exchange between Stephens and Judge Henderson has all the hallmarks of a serious misunderstanding. Stumpf was unwilling to plead "guilty" without expressly reserving his right to present evidence "relevant to his conduct." Read with the preceding reference to presenting evidence, this could only refer to the subsequent evidentiary hearing to establish a factual basis for the plea. Stumpf, obviously, was reiterating his desire to challenge the state's account of his actions, and had the procedure called for an immediate determination of the evidence relied upon by the state to support the defendant's imminent conviction, the misunderstanding would undoubtedly have come to light before the plea was finalized and Stumpf's fate was sealed. Once again, however, Judge Henderson referred to the defendant's "right to present evidence in mitigation hearing," completely missing the clear implication that despite his admission of guilt, Stumpf was concerned about preserving his ability to contest the state's account of his actions.

Moreover, defense counsel's arguments during the subsequent evidentiary hearing confirm the defendant's desire

to contest the state's version of the crime. From the opening statement at that hearing, counsel argued that Wesley, not Stumpf, was the one who shot Mary Jane Stout. For example, defense counsel's opening statement included the following:

> The scenario as outlined by Scott [the prosecutor] does follow the sequence of events as they did occur, except for the statements as to the actual shooting of Mary Jane Stout, which the defendant believes the evidence will show occurred at the hands of Daniel Wesley.

The district court rejected Stumpf's argument that his position that he was not the shooter rendered his guilty plea involuntary, relying on *Garcia*, 991 F.2d at 327, as authority for the proposition that a "temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Stumpf v. Anderson*, 2001 WL 242585 (S.D. Ohio 2001) (quoting *Garcia*, 991 F.2d at 327). We conclude that the district court's reliance was misplaced, however, because Stumpf's qualification was more than temporary, and it was never addressed by the trial court.

By contrast, in *Garcia*, the defendant first claimed that he had not intended to kill his victim. *Garcia*, 991 F.2d at 327. After this statement, the judge conducted "a substantial discussion" with the defendant regarding the facts of the case, and Garcia then admitted that he had intended to kill his victim. *Id.* Here, the trial judge, before accepting Stumpf's plea, had not informed the defendant that specific intent was an element of the crime to which he was pleading, nor had he inquired whether Stumpf had actually shot the victim or, if not, had specifically intended that she be killed. In the absence of some inquiry, Stumpf's express reservations of his ability to put on evidence of his version of the crime, along

with his attorneys' arguments that he did not intend, and was not even present for, the killing of Mrs. Stout, should have put the trial court on notice that Stumpf was not aware of the true import of his plea.

The district court did not focus on the question of intent. Rather, it found that Stumpf's position that he was not the shooter was consistent with the *specification* to which he pleaded guilty. However, in making this finding, the district court failed to recognize that Stumpf's position is inconsistent with the *charge* to which he also pleaded guilty. It is this inconsistency that gives rise to his claim that his plea was not validly entered.

Generally, a reviewing court presumes that defense counsel has explained the elements of the crime to a defendant pleading guilty, even where the record does not reflect any statement by counsel to that effect. *Berry v. Mintzes*, 726 F.2d 1142, 1147 (6th Cir. 1984) ("it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice"); but cf. *Henderson v. Morgan*, 426 U.S. 637, 642-48, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976) (finding that, where the defendant's attorneys had argued to the court that their client had not intended to harm the victim, there could be no presumption that counsel had explained to their client that intent was an element of the crime). In this case, defense counsel did state to the court that they had informed Stumpf of the elements of the crime. In a typical case, such an assurance would prevent a reviewing court from finding that a plea was involuntary. In this case, however, the record clearly establishes that Stumpf sought to preserve his right to argue that he was not the shooter and thus counterbalances the assurances given by defense counsel that they had explained the elements to Stumpf.

We recognize, of course, that Stumpf need not have been the "principal offender"—the actual shooter—in order to have specifically intended the death of Mary Jane Stout. Nevertheless, it is clear from the record of the factual basis hearing that the state's theory of guilt relied completely on Stumpf being the principal offender. The prosecution presented no evidence that Stumpf intended Mrs. Stout's death, other than arguing that he was the actual shooter. In the closing arguments at the evidentiary hearing, defense counsel, contending that the prosecution had not met its burden with regard to the basis for seeking the death penalty, effectively challenged the prosecution's proof as to specific intent to kill. The prosecutor responded that "as to a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It seems to me that shooting a person four times shows what your intent was."

Indeed, the three-judge panel, which presumably knew of the intent element, found, beyond a reasonable doubt, that Stumpf was "the principal offender" in the aggravated murder and made no other finding as to specific intent. Its conclusion in this regard indicates that the panel found that Stumpf's shooting of Mrs. Stout provided the requisite specific intent, as there was no other evidence in the record to satisfy this element. Given this finding, it is unlikely that Stumpf can be said to have knowingly conceded specific intent to kill by pleading guilty, when he continued to maintain throughout the proceedings that he had not been the one who actually shot the victim.

We conclude that the record of Stumpf's plea hearing and the subsequent evidentiary hearing, taken together, demonstrate that the plea he entered was constitutionally invalid. *Boykin* holds that, "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Boykin*, 395

U.S. at 243 n.5. This understanding must include "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. at 644 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L. Ed. 859, 61 S. Ct. 572 (1941) (finding that, because the defendant did not know intent was an element of the crime to which he pleaded guilty, his plea could not be voluntary). n5 We have held that "a guilty plea is not deemed voluntary where the person entering it does so without understanding of the consequences of his plea." *United States v. Stubbs*, 279 F.3d 402, 411, 412 (6th Cir. 2002) (quotation omitted) (finding, in a split decision in a case involving a mandatory minimum sentence, that if the "essential elements of the crime with which the defendant was charged were not understood by the defendant, his counsel, or the district court, then the defendant's guilty plea would be constitutionally invalid").

n5 Indeed, in *Henderson*, the defendant had heard the indictment, which charged that he had "willfully" stabbed the victim, read in open court. *Henderson*, 426 U.S. 637, 642, 49 L. Ed. 2d 108, 96 S. Ct. 2253. The Supreme Court found that this was not sufficient to put him on notice that intent was a required element of the crime to which he was pleading guilty. *Id.* at 645-46.

As discussed above, when the state court record of a defendant's plea does not demonstrate that the plea is constitutionally adequate, the state bears the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings discussed above. Instead, the respondent has explicitly relied on that record alone to argue that the plea was voluntary, knowing, and intelligent. Given the paucity—indeed, the lack—of the evidence to refute what is clear on the record, we must conclude that the state has

therefore not met its burden of showing that the plea may stand.

Furthermore, the totality of the circumstances surrounding the plea provide additional evidence that the plea was not voluntary, knowing, and intelligent. For example, Stumpf argues that the fact that he remained eligible for the death penalty and, therefore, pleaded guilty under an agreement that provided absolutely no benefit in the form of a reduction in possible sentence, is an additional indication that his plea was not knowing and intelligent. n6 This argument standing alone would not carry much weight, given the well-recognized principle that a guilty plea cannot be rendered involuntary merely because, in hindsight, it turned out not to be the best decision. See *McMann v. Richardson*, 397 U.S. 759, 769-71, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). However, Stumpf's decision to plead guilty—by agreement—to a crime with a capital specification, especially in the absence of any identifiable reason to take such a course of action, creates an additional inference that his plea was invalid. In combination with his position that he was not the shooter, which reveals his ignorance of specific intent as an element of the crime, the record indicates that Stumpf's plea was involuntary "because he had such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Ivy v. Caspari*, 173 F.3d 1136, 1141-42 (8th Cir. 1999) (guilty plea involuntary where defendant was not informed that intent was a necessary element of the underlying felony).

N6 Stumpf also claims that his plea was invalid because he was not aware that he remained eligible for the death penalty. We discount this as a possible basis for relief, however, because the record of the plea hearing indicates that the judge, while listing the possible sentences Stumpf could receive for aggravated murder, did inform Stumpf at the time of his plea that "the death

penalty by electrocution could be imposed against you." The judge then asked whether Stumpf understood, and Stumpf answered, "Yes, sir."

The question of counsel's effectiveness in representing Stumpf is not before us as an independent ground for relief. It is, however, raised in the context of challenge to the validity of his guilty plea. The record shows clearly that Stumpf has always denied being the shooter. It is also clear that defense counsel's strategy, throughout both the evidentiary hearing and the mitigation hearing, was to argue that after Stumpf shot Norman Stout he panicked and fled, that Stumpf was not even present in the home when Mary Jane Stout was shot, and that Wesley was, in fact, the one who shot Mrs. Stout. One possible, if unlikely, explanation for counsel's strategy is that they themselves were unaware that specific intent was an element of the crime. But, failure to research the most basic details of the statute under which their client was charged would be outside the "range of competence" to which the defendant is entitled. See *Henderson*, 426 U.S. at 647. Perhaps more disturbing is the possibility that counsel, realizing that intent was an element of the offense, nonetheless chose to allow their client to plead guilty and then—and only then—to contest the existence of that element. But this, too, would manifestly constitute ineffective assistance, since a plea is not merely a confession but serves as a conviction, with only the resulting sentence left to be decided. See *Boykin*, 395 U.S. at 242. It is true that Ohio requires a factual basis hearing in cases of aggravated murder, but it would nonetheless be reckless and plainly incompetent for an attorney to rely on a factual basis hearing to refute an element of a crime to which his client has already pleaded guilty. Finally, whether Stumpf's lawyers were aware of the intent element or not, their behavior compels the conclusion that Stumpf himself was not aware of the intent element. Stumpf's observation of his attorneys' attempt to contest the state's version of events, and his own position throughout the

plea colloquy that he intended to challenge the state's facts, a position evidently sanctioned by his attorneys, reaffirms the conclusion that Stumpf was not aware that by pleading guilty to aggravated murder he was admitting to specific intent to kill Mary Jane Stout.

There are other indications in the record, as well, pointing to the existence of at least a reasonable probability that Stumpf would not have pleaded guilty had he known that such a plea would have amounted to admitting that he specifically intended the death of Mary Jane Stout. A mitigation investigator later reported, in an affidavit, that "John did not want to plead guilty." Moreover, affidavits from Stumpf's family affirm the impression that his attorneys were less than candid in explaining to them the motive behind the plea. For example, Stumpf's mother and sister said that they were told by Stumpf's attorney that he would not receive the death penalty because of his plea.

We conclude from the record before us, as it relates to the murder of Mary Jane Stout, that there exists a reasonable probability that, had the petitioner been fully informed of the elements of the offense to which he was pleading and consequences of that plea, he would not have pleaded guilty to her aggravated murder.

B. The Due Process Violation

At the time of Stumpf's post-plea evidentiary hearing and his mitigation—or sentencing—hearing, his accomplice, Wesley, was still in Texas, fighting extradition. During both Stumpf's plea hearing, held pursuant to Ohio Rev. Code § 2945.06, and his sentencing hearing, the prosecutor argued, and the three-judge panel ultimately found, that Stumpf was the principal offender, responsible for actually shooting Mary Jane Stout. After Stumpf's sentencing in the fall of 1984, the state tried Clyde Wesley before a jury in the spring of 1985. Wesley was also charged with aggravated murder with capital specifications, and during his trial, the state argued that Wesley, not Stumpf, was the shooter. To support this argument, the state presented testimony from Eastman, Wesley's cellmate, about statements Wesley had made to Eastman concerning details about the murder. Wesley took the stand and denied that he was the shooter, but the jury convicted him of the aggravated murder of Mrs. Stout. At the sentencing phase of Wesley's trial, the same jury then recommended a sentence of 20 years to life, rather than the death penalty.

Stumpf argues that the prosecutor's use of two conflicting theories concerning the identity of the shooter to convict both him and Wesley constitutes a due process violation.

The Constitution's Due Process clause guarantees every defendant the right to a fair trial. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-5, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72, 13 L. Ed. 2d 424, 85 S. Ct. 546 (1965). The Supreme Court has also emphasized that "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . , it is as much his duty to refrain from improper methods

calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960).

Drawing on the principle that the Constitution's "overriding concern [is] with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), several of our sister circuits have found, or implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the *due process clause*. See, e.g., *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); cf. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) (involving a situation where both defendants had shot at the victim and it was unclear whose bullet had actually hit and killed the victim; the court found that the two theories advanced by the prosecution were not inconsistent because both defendants could have been convicted under the law of parties). On this issue of first impression in this court, we now join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation.

In *Smith v. Groose*, the Eighth Circuit considered a case in which a prosecutor had used two different, conflicting statements by a co-defendant at successive trials to convict the petitioner at the first trial and a second individual at a second trial. See *Smith v. Groose*, 205 F.3d at 1049. That case involved a group of four young men who were looking for homes to burglarize one evening. In the course of their search, they saw another group of burglars breaking into a home.

They realized they knew these men and decided to help them break into the house. The residents were murdered in the course of the burglary. The primary issue at trial was whether the murders took place before or after the four young men began participating in the offense. One of the four men first told the police that the other group had committed the murders without the participation of the group of four. Two days later, he told police that he had seen one of the four men from his group stabbing the victims with a pocketknife; he later recanted this story. The prosecutor then used both statements to obtain convictions against men in each of the two groups. See *id.* at 1047-49.

Examining the record before it, the Eighth Circuit held that "the use of inherently factually contradictory theories violates the principles of due process." *Id.* at 1052. The court found that in order to amount to a due process violation, an inconsistency in the prosecutor's theories "must exist at the core of the prosecutor's case against defendants for the same crime." *Id.* This constitutes a due process violation because it renders convictions unreliable, given that "the state's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Id.* at 1051.

In finding a due process violation under these circumstances, the Eighth Circuit in *Smith v. Groose* was careful to distinguish the facts in its case from those in the Fifth Circuit's opinion in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), where the court did not reach the due process question in a case in which the prosecutor argued in two separate cases that different defendants had each shot the one bullet that killed the victim. See *id.* at 1268. The distinction in the *Nichols* case was that both perpetrators had fired shots at the victim, and both could have been convicted under a felony murder theory. Therefore, the prosecutor's arguments were not factually inconsistent, because both defendants could have

been convicted even if the prosecutor had used the identical argument in both cases. See *Groose*, 205 F.3d at 1051.

Finally, the Ninth Circuit considered a similar situation in *Thompson*. In that case, the prosecutor argued at one trial that, based on jailhouse informant testimony, one defendant had committed a rape and murder. At a second trial, the prosecutor used different jailhouse informants to argue that the second defendant had the motive and disposition to commit the crimes. A plurality of the en banc Ninth Circuit, n7 specifically excluding situations where new evidence comes to light, found that a prosecutor cannot use inconsistent theories of the same crime in order to secure multiple convictions. See *id.* at 1058. The court echoed Judge Clark's concurrence in an Eleventh Circuit case which, although it granted habeas relief on alternate grounds, also involved inconsistent theories:

> The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

Thompson, 120 F.3d at 1059 (quoting *Drake*, 762 F.2d at 1479 (Clark, J., concurring)).

n7 The majority opinion rested on an ineffective assistance of counsel claim. See *Thompson*, 120 F.3d at 1051-56. However, despite the fact that a majority of judges did not join in the portion of the opinion finding a

due process violation, several of the concurring and dissenting judges indicated that they would find a due process violation for the use of wholly inconsistent theories to convict separate defendants. See, e.g., *id.* at 1063-64 (Tashima, J., concurring, joined by Thomas, J.) (agreeing with the premise that "due process is violated when a prosecutor pursues wholly inconsistent theories of a case at separate trials" but arguing that, in order to find prejudice, the court must decide which of the two theories is true) (quotation omitted); *id.* at 1066-73 (Kozinski, J., dissenting, joined by Nelson, J.) ("In the case of mutually inconsistent verdict, which I am not sure is the case here, I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts." *Id.* at 1071.)

In this case, the state clearly used inconsistent, irreconcilable theories at Stumpf's hearings and Wesley's trial At each proceeding, the prosecutor argued that the defendant had been the one to pull the trigger, resulting in the fatal shots to Mary Jane Stout. At Wesley's trial, the prosecutor relied on Eastman's testimony and on the gun-switching scenario argued by Stumpf, to secure Wesley's conviction. The prosecutor asserted:

> Believing he had killed Mr. Stout, [Stumpf] pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point [Wesley,] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime.

These statements are irreconcilably inconsistent with those made by the very same prosecutor at Stumpf's plea hearing, when he told the trial court:

> Believing that the had killed Mr. Stout, Stumpf [then] turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times. Three times in the left side of the head and neck and one time in the writs; obviously in order not to leave anyone available to identify him.

The state claims that, because Eastman's testimony was not available at the time of Stumpf's guilty plea, Stumpf is really asserting Wesley's due process claim in the guise of his own. The state also argues that "it was of no import to the charge of capital murder against Stumpf which of the two [defendants] killed the witness [Mrs. Stout]" since the capital specification was that Mrs. Stout was killed because she was a witness to the crime, and not that the defendant had been the shooter. Finally, the state asserts that inconsistent, irreconcilable theories were not used in these two cases, because the prosecution did not rely on Eastman's testimony at Wesley's trial. None of these arguments is persuasive.

First, Stumpf clearly has a due process claim even though Eastman's testimony was not available at the time of his trial. It is true that this is not a case where the prosecutor selectively presented evidence in Stumpf's case to support the theory of the murder he was arguing in that case. However, the due process challenge to the use of inconsistent theories is based on the notion of fundamental fairness. Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used. In *Groose*, the petitioner was in fact the defendant at the first trial, and the second, inconsistent theory did not come to light until four years after his conviction, at the second trial. See *Groose*, 205 F.3d at 1048. Nevertheless, the Eighth Circuit found that his due process rights had been violated. Logically, "both

[defendants' due process rights] were prejudiced by the prosecutor's actions or neither's were." *Drake*, 762 F.2d at 1479 (Clark, J., concurring). Furthermore, it is disingenuous of the state to argue that there is no violation of Stumpf's rights because the prosecutor had no knowledge of Eastman's testimony at the time of Stumpf's plea. The state learned of Eastman's testimony soon after Stumpf's plea and sentencing and yet continued to maintain that the convictions of both Stumpf and Wesley, each of which was obtained by arguing that a different individual was the shooter, were sound and reliable. n8 Indeed, as discussed below, the state maintained that Eastman's testimony was unreliable during a hearing on Stumpf's motion to vacate his plea and/or his sentence. To this day, there has been no suggestion of corrective action by the state.

n8 In fact, Wesley's counsel wanted to inform the jury that the prosecutor had previously argued that Stumpf, and not Wesley, was the shooter. The prosecutor argued that Stumpf had never admitted to firing the shots, and that his own argument was irrelevant. The trial court did not allow Wesley's counsel to discuss Stumpf's proceedings in front of the jury.

The state's second argument, with which the district court agreed, is that the identity of the shooter was not the critical issue in either trial and that therefore the use of different theories did not violate Stumpf's due process rights. By pleading guilty to capital murder, the state's argument goes, Stumpf admitted concerted action with Wesley in causing the death of Mary Jane Stout for the purposes of avoiding detection. All that was left for the prosecution then to prove, under this theory, was that Mrs. Stout was killed so that the defendant could escape detection for other crimes. But this argument ignores the fact that, as the aggravated murder statute existed in 1984, specific intent was a necessary element of the crime. See Ohio Rev. Code § 2903.01(B); see

also supra, pp.15-16. Because Stumpf never confessed to specific intent to kill Mrs. Stout, the prosecution bore the burden of proving beyond a reasonable doubt that Stumpf was guilty of the charge.

Finally, the state argues that irreconcilable theories were not used because Eastman's testimony was completely unreliable. State's counsel even asserted at oral argument that the state did not rely on Eastman's testimony in order to prosecute Wesley. This argument is just short of astounding, given the fact that in seeking to convict Wesley of aggravated murder, the prosecution offered no proof of the element of specific intent other than the theory that Wesley was the actual shooter. That the state relied on Eastman's testimony is evident from the fact that it presented his testimony to the jury, and from the fact that it prevented Wesley's counsel from presenting evidence of Stumpf's guilty plea. Had the state presented a theory of the crime consistent with the theory it asserted at Stumpf's evidentiary hearing, it would have had no need to keep that information from Wesley's jury.

The district court ultimately accepted the state's argument that the core issue at Stumpf's evidentiary hearing was not the identity of the shooter. However, in reaching this conclusion, the court started with what we believe to be a faulty assumption, *i.e.*, that "the state was not required to prove that petitioner was the actual shooter." The district court, in concluding that the specification to which Stumpf pleaded guilty, Ohio Rev. Code § 2929.04(A)(3), did not require that Stumpf be proven to be the "principal offender," overlooked, once again, the fact that the aggravated murder statute itself requires specific intent. See discussion supra pp.

15-16. The state was not required to prove that the petitioner was the actual shooter, but it was required to prove specific intent.

Even proceeding from the district court's false assumption, however, we cannot agree with the court's ultimate conclusion. The district court found that, although the state was not required to prove that Stumpf was the actual shooter, "the fact remains that the state did argue that petitioner was [the] actual shooter and the trial court did find that petitioner was the actual shooter." The district court went on to recognize that the trial court cited this very finding as "a reason, and a very substantial reason" that petitioner received the death penalty. The district court found, however, that habeas relief was not warranted, because the Supreme Court of Ohio's independent reweighing of the aggravating and mitigating circumstances cured any misplaced reliance on Stumpf having been the actual shooter. Apparently engaging in such a reweighing process, the Ohio Supreme Court concluded that Eastman's testimony was not sufficient to tip the balance of aggravating and mitigating factors.

We cannot agree with this reasoning, because we do not believe that a reweighing of the factors used to support imposition of the death penalty cures the due process violation at issue. The Ohio Supreme Court, it is true, found that "the testimony of a cellmate during Clyde Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing." *State v. Stumpf*, 32 Ohio St. 3d at 106. But, putting aside for the moment the question of whether Eastman's testimony need be credible for a due process violation to be established by the state prosecution's presentation of and evident reliance on it, there is no explicit state court determination regarding Eastman's credibility to which this court must give deference. Although there is a presumption that a state court's factual findings are

correct, this presumption applies only to basic facts and to those facts implicitly established through the trial court's unique ability to judge the witnesses' credibility and demeanor. See *McQueen*, 99 F.3d at 1310. No court at any level considering Stumpf's claims actually observed Eastman's testimony. n9 The first court explicitly to examine the transcripts of that testimony, the two-judge trial panel, failed to make any factual findings, instead denying Stumpf's motion summarily. The Supreme Court of Ohio recognized as much when it found that the trial court had "apparently" determined that Eastman's testimony did not change the balancing of mitigating and aggravating factors. The Supreme Court of Ohio also presumably examined the transcripts, concluding that the testimony was of "minimal credibility." Neither the presumed factual finding by the trial court, nor the more explicit one made by the Supreme Court of Ohio is due the type of complete deference contemplated by the state, because neither of these courts had any better opportunity to judge Eastman's credibility than we do.

n9 Indeed, only two fact-finders actually observed Eastman's testimony. The jury at Wesley's trial obviously credited Eastman enough to find Wesley guilty. The trial judge, in pre-trial proceedings, made at least one credibility determination when he found that Eastman was not a government agent within the meaning of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). See *State v. Wesley*, 1986 Ohio App. LEXIS 8651 (1986).

Finally, the state presses an argument that Eastman's testimony was not credible because it relied on "the same type of implausible gun switching and gun juggling that Stumpf told." n10 This, of course, is beside the point. The pertinent fact for Stumpf's due process claim is not whether Eastman's gun-switching story is plausible, n11 but whether the prosecution relied on that story to secure Wesley's conviction.

The prosecution found Eastman's testimony credible enough to present the "implausible gun switching" theory to Wesley's jury and obtain his conviction on that theory.

> n10 Eastman testified at Wesley's trial that Wesley told him that after Stumpf had shot Mr. Stout, Stumpf panicked and dropped the .25 caliber Raven. Wesley then picked up the Raven and shot Mrs. Stout a few times. When Mrs Stout moaned, Wesley shot her again to make sure she was dead.
>
> n11 One could argue that this story is more likely to be plausible because it is so similar to Stumpf's account of the crime, which he recounted many months before Eastman testified.

In holding that a constitutional violation occurred in this case, we recognize that at least one circuit has suggested that a due process violation for the use of conflicting theories may be obviated when the second of two inconsistent theories results from the discovery of new evidence. See *Thompson*, 120 F.3d at 1058 ("when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime"). We have no quarrel with this proposition, to the extent that it is meant to acknowledge a state's need to continue to investigate crimes and to present all available evidence in court. However, in this case, although Eastman's testimony did not come to light until after Stumpf had been convicted and sentenced to death, the state had many opportunities to correct its use of conflicting theories. Stumpf, upon learning of the state's reliance on the theory that Wesley was actually the shooter, timely filed a motion to vacate his guilty plea and/or his sentence. The two judges hearing this motion expressed some concern over whether there was evidence that Stumpf was not in fact the shooter, but the state did not take that opportunity to advocate

that all the available evidence be presented to the sentencing panel.

A due process claim is a mixed question of law and fact and is therefore subject to *de novo* review. See *Williams v. Coyle*, 260 F.3d 684, 706-07 (6th Cir. 2000). Here, the proper standard of review is whether there is a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories rendered the conviction unreliable. See, e.g., *id.*, at 706-07; *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052(1984). A "reasonable probability" is a probability sufficient to undermine the outcome and is less than a preponderance of the evidence. See *Strickland* at 694; *Lyons v. Jackson*, 299 F.3d 588, 599 (6th Cir. 2002).

Measured against this standard, the state's due process violation mandates that both Stumpf's plea and his sentence be set aside. First, there is a reasonable probability that, had the prosecution not pursued conflicting theories concerning who was the actual shooter, Stumpf either would not have pleaded guilty or the three-judge panel would not have found a factual basis for the specific intent element of aggravated murder. Second, and perhaps more likely, there is a reasonable probability that, had the prosecution not pursued inconsistent theories, Stumpf would not have been sentenced to death.

As discussed at length above, it was necessary for the three-judge panel to find that Stumpf specifically intended the death of Mary Jane Stout in order for it to accept his plea to aggravated murder. See Ohio Rev. Code § 2903.01(D) ("no person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another"). The prosecution offered virtually no evidence regarding intent other than its contention that Stumpf shot

Mrs. Stout. Had the prosecution's alternate theory been heard by the three-judge panel, there is a reasonable probability that it would have found Stumpf guilty of something less than aggravated murder.

Moreover, there is more than a reasonable probability that the three-judge panel would not have sentenced Stumpf to death had the prosecution not employed inconsistent and irreconcilable theories. In explaining its reasoning for finding that the aggravating factors in Stumpf's case outweighed the mitigating factors (and therefore that Stumpf deserved the death penalty), the court's first pronouncement was that it had "found beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment," *i.e.*, the aggravated murder charge. In turn, this finding prevented the panel from concluding that Stumpf was *not* the principal offender, which would have been "a powerful mitigating factor." *State v. Green*, 90 Ohio St. 3d 352, 363, 2000 Ohio 182, 738 N.E.2d 1208, 1224 (Ohio 2000) (noting that "very few death sentences have been approved against persons who were not the principal offender"). In fact, during the hearing on Stumpf's motion to withdraw his guilty plea, one of the original panel members, Judge Bettis, stated:

> If we had not been satisfied that Stumpf was, in fact, the trigger man, the principal offender . . . that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

It is true that Judge Bettis made this comment during a hearing in which the panel had before it both a transcript of Eastman's testimony and evidence of the prosecution's reliance on that theory of the crime. However, the fact that the panel did not grant Stumpf's motion to withdraw his guilty plea does not dictate the conclusion that they did not find Eastman's testimony persuasive. First, in denying the motion

summarily, the panel stated, "The Court took the matter under advisement and after having considered the same, does overrule the Motion to Withdraw Former Plea and the Alternative Motion to Set Aside the Sentence Imposed." Because the court gave no basis for its ruling, the denial of relief could have been made on any number of grounds; it would be impossible to divine its reasoning. Hence, the panel's rejection of Stumpf's motion does not negate the conclusion that, had the prosecution's alternate theory been before the panel at a sentencing proceeding, there is a reasonable probability that the panel would not have sentenced him to death. Second, only two of the three judges on the original panel were still alive when Stumpf brought his motion. Stumpf's contention that his motion should have been heard by three judges was rejected by the Ohio Supreme Court:

> R.C. 2945.06 expressly provides that "the judges or a majority of them may decide all questions of fact and law arising upon the trial . . . ." Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

State v. Stumpf, 32 Ohio St. 3d 95, 105, 512 N.E.2d 598, 609 (Ohio 1987).

Under Ohio Rev. Code § 2945.06, then, only one judge's opinion was required to deny Stumpf's motion. However, under the same provision, unanimity was required as to questions of guilt and penalty. Because the third judge on Stumpf's panel died before the prosecution's alternate theory and Eastman's testimony came to light, the trial court's denial of Stumpf's motion can prove nothing as to whether that third judge, at the factual basis or mitigation hearings,

would have been persuaded by Eastman's testimony, and the state's reliance on it, that Stumpf should either not have been found guilty of aggravated murder, or should not have received the death penalty.

Finally, as petitioner points out, Ohio courts have held that reweighing of aggravating and mitigating circumstances by a higher court is not a cure for errors in the sentencing process, where the result of the weighing process, had the correct factors been present, is unknown. See *State v. Davis*, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (Ohio 1988) ("We cannot accept independent review as a cure in this particular action because we cannot know if the result of the weighing process by the three-judge panel would have been different had the impermissible aggravating circumstance not been present.").

IV. CONCLUSION

On the basis of the two claims addressed in this opinion, that Stumpf's guilty plea was not voluntary, knowing, and intelligent and that his due process rights were violated by the prosecution's use of inconsistent, irreconcilable theories to convict both him and his accomplice, we REVERSE the district court's decision and REMAND this case to the district court with instructions to issue the writ of habeas corpus in the petitioner's favor, unless the state elects to retry him within 90 days of the date of entry of the conditional writ. Because we are granting Stumpf relief on both his involuntary plea and due process claims, we need not reach his remaining arguments.

DISSENT BY: BOGGS

DISSENT

BOGGS, Chief Judge, dissenting. The court has reversed the district court's denial of a writ of habeas corpus on two grounds: that Stumpf's guilty plea was involuntary and unknowing, and that his due process rights in his own trial and sentencing were violated by the state's *later* use of evidence against another person. I disagree with both of these conclusions, and therefore respectfully dissent from the granting of the writ of habeas corpus.

I

I begin with the second of the court's two grounds, as I believe that is the more profoundly mistaken. The majority cites three cases from other circuits to buttress its theory that Ohio's prosecution of Wesley, which took place in April 1985, some seven months after Stumpf pleaded guilty and was sentenced to death, somehow violates Stumpf's due process rights. None of the three are germane to this case.

In *Thompson v. Calderon*, a celebrated California death penalty case, the court vacated a death sentence because the prosecutor presented two mutually incompatible theories for the rape-murder during contemporaneous trials of two defendants, Thompson and Leitch. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc) (plurality), *vacated on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998). During the pre-trial proceedings for both men, and in Leitch's trial, the prosecutor's theory was that Leitch killed the victim, his girlfriend, because he wanted to get back together with his ex-wife; Thompson assisted him in the crime. *Id.* at 1055. In Thompson's trial, however, the prosecutor argued that Thompson had raped the victim and then killed her to cover up his act. He presented different jail house informants at each trial to bolster each contradictory theory. *Id.* at 1056. The Ninth Circuit held that this shift in arguments violated a prosecutor's duty to discover the truth

and that he was improperly trying to secure convictions for their own sake. *Thompson*, 120 F.3d at 1058-59; see, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) (stating that the government's fundamental interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done"). It also found that Thompson, who was tried first, was prejudiced due that the fact that "only in Thompson's trial did the prosecutor change the theory and the arguments [from those presented in the pre-trial hearing], and offer facts that directly conflicted with the underlying premise of the charges he brought." *Thompson*, 120 F.3d at 1059.

Distinguishing *Thompson* from the case before us is not difficult, however. First of all, the prosecutor in *Thompson* pursued the two mutually incompatible theories of the murder at contemporaneous trials after joint pre-trial proceedings, and deliberately chose witnesses who would tell the conflicting story that he needed to convict each defendant. Knowingly putting on false evidence is prosecutorial misconduct that violates the Due Process Clause. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). Nothing in this case indicates that the prosecutors deliberately presented false evidence: Stumpf pleaded guilty to aggravated murder with the specification of killing a witness and attempted aggravated murder with a firearm. The State had every reason to believe his over-all admission of responsibility. It was under no obligation, however, to accept at face value his assertion that he did not actually pull the trigger, especially in light of contradictory forensic evidence, such as the fact that a .25-caliber weapon killed Mrs. Stout, the same caliber as Stumpf's gun.

Nor did the prosecutor in *Thompson* collect new evidence between trials; he simply manipulated the facts that he had. In contrast, Wesley's trial took place seven months after Stumpf pleaded guilty, during which time informant

Eastman told prosecutors that Wesley confessed that he murdered Mrs. Stout. However, Wesley denied having confessed to Eastman, and the forensic evidence suggested that Eastman's statement was not airtight. A cursory comparison of the facts to those in *Thompson* therefore reveals that the California case has little application to our case. n1

> n1 It is worth noting that constitutional claim made in *Thompson* ultimately did not prevent the defendant's execution on July 14, 1998. *Calderon v. Thompson*, 523 U.S. 538, 566, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (reinstating the mandate denying habeas relief).

In *Drake v. Kemp*, an Eleventh Circuit case, the majority remanded for a new trial because the burden of proof was improperly shifted to the defendant and the prosecutor violated the defendant's rights during his closing arguments in the sentencing phase. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc). A single concurring judge argued that Drake's Fourteenth Amendment rights had been violated. The prosecutor, in trials that were a year apart, argued in one instance that a co-defendant must have committed the murder alone and, after having secured a conviction, argued that same person was not strong enough to commit the crime, and therefore Drake must have helped. The concurring judge concluded that it "seems inescapable that the prosecutor obtained Henry Drake's conviction through the use of testimony he did not believe; bringing this case under the logical if not actual factual framework of . . . *Napue*." *Drake*, 762 F.2d at 1479 (Clark, J. specially concurring). *Drake* therefore does not further Stumpf's case either: a concurring opinion that turns on the prosecutor's inferred knowledge that he was presenting false evidence does not comport with the facts in this case.

The last case cited by the majority, *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), is equally unconvincing. That case involved two groups of robbers, the first of which, when preparing to burglarize a house, discovered the second already in the process of stealing the homeowner's possessions. The two groups joined forces, and at some point during the crime the homeowners were murdered. *Id.* at 1047. The leader of the first group, Anthony Lytle, provided varying accounts of what happened, alternately claiming that the head of the second group, Michael Cunningham, killed the couple and that one of his (Lytle's) cohorts, James Bowman, was the murderer. *Id.* at 1047-48. The state convicted Jon Keith Smith, another member of Lytle's group, for felony-murder based on his association with purported fellow gang member Bowman, who was argued to be the actual killer. Four months later, the state then successfully prosecuted Cunningham for the same murders, based on Lytle's other story that Cunningham had already killed the couple when Lytle and his friends entered the house. *Id.* at 1048.

The Eighth Circuit ultimately granted Smith a writ of habeas corpus because the state's prosecution of Cunningham violated Smith's due process rights. *Ibid.* Again, the crux of the case was the deliberate presentation of false evidence: "In short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa." *Id.* at 1050. Only a showing of this kind of prosecutorial misconduct could support a claim, dubious as it might be, that Stumpf's constitutional rights were retroactively violated.

Although this court mentions the prosecution's knowledge of Eastman's subsequent statement concerning Wesley's alleged confession to being Mrs. Stout's killer, the court's decision does not rest on this knowledge. It is undisputed that the prosecution did not know of Eastman's statement at the time of Stumpf's conviction and sentencing. Nothing indicates that the prosecution cherry-picked facts in

order to confirm Stumpf's guilty plea in the evidentiary hearing. The majority does not argue that the prosecution was under any obligation to confess error in Stumpf's post-conviction proceedings or appeals, nor even to bring Eastman's statement to Stumpf's attention. There is simply no prosecutorial misconduct in this case that could retroactively implicate Stumpf's due process rights.

Groose does not "hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather [it] holds only that the use of inherently factually contradictory theories violates principles of due process." *Id.* at 1052. The majority remarkably expands this holding to conclude that *evidence* in a second case that contradicts a *guilty plea* in an earlier case can implicate due process rights. Stumpf pled guilty after a colloquy in which he indicated that he understood that he was waiving certain constitutional rights. A defendant's guilty plea is an "admission that he committed the crime charged against him." *North Carolina v. Alford*, 400 U.S. 25, 32, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970). Nothing in the record suggests that the prosecutor was remiss in relying on Stumpf's acknowledgment of guilt. See *Dickerson v. United States*, 530 U.S. 428, 450, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) (Scalia, J., dissenting) (observing that if a defendant voluntarily acknowledges wrong-doing, the "Constitution is not . . . offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity). n2 Therefore, I do not see any grounds on which to base an allegation that the prosecution skewed the same set of facts in two different trials in order achieve two mutually incompatible guilty verdicts. This case has little or no similarity with the facts of *Thompson*, *Drake*, and *Groose*.

n2 Even assuming, *arguendo*, that the majority is correct that Stumpf pled guilty based on substandard legal advice, it does not follow that accepting the

acknowledgment of guilt amounts to prosecutorial misconduct, the prerequisite for finding a violation of Stumpf's constitutional rights. The majority argues that the plea was not voluntary, a conclusion I address *infra*, but the validity of the plea is an entirely different matter. However flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt, as required in *Groose*.

Far more instructive is the Ninth Circuit's quite recent decision in *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003). The court held that imposing sentence enhancements on two defendants for personal use of a firearm during an attempted robbery and assault on a restaurant manager was not a violation of due process, although the testimony clearly indicated that only one perpetrator had held a gun to the manager's head. *Id.* at 701-02. When the first defendant, Shaw, learned of the conviction and sentence of his accomplice three years later, he filed a habeas petition, citing the California Court of Appeals decision upholding Watts's sentence which stated: "Indeed, the evidence adduced at trial, which presumably was available to the prosecutor prior to trial, tends to support the conclusion that the jury in [Shaw's] trial was mistaken." *People v. Watts*, 76 Cal. App. 4th 1250, 1259-61, 91 Cal. Rptr. 2d 1 (1999) (quoted in *Shaw*, 353 F.3d at 701) (bracket added in *Shaw*).

However, the *Shaw* court distinguished its case from *Thompson*, pointing to the fact that the prosecutor did not manipulate evidence—the same crucial distinction that is present in our case. *Shaw*, 353 F.2d at 702. Ambiguous evidence is not false evidence; "regrettable" tactics are not necessarily unconstitutional. *Id.* at 703-04. The fact of the matter is that no one but Wesley and Stumpf know who shot Mrs. Stout. The State is entitled to put on the available evidence to convince the finder of fact of guilt. As long as it

does so in a good faith manner, without manipulating or selecting out critical evidence, due process is not violated.

The *Shaw* court also speculated that if there were a constitutional violation, that Watts, the second defendant, rather than Shaw, would be the one who could argue the point. *Id.* at 704, n. 5. Similarly, I could understand a court accepting Wesley's claim that the prosecution could not honestly present evidence in *his* case that contradicted what the government had relied upon previously (a type of "prosecutorial estoppel"), or even that it could not present evidence that contradicted a position it was taking elsewhere. However, none of those theories can retroactively render unfair the fundamentally fair proceedings that Stumpf received.

Having indicated that I believe it is logically impossible for Stumpf's claim to succeed under these circumstances, I touch only lightly on the court's resolution of the question of "whether there is a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories rendered the conviction unreliable." (Maj. Op. at 40). Nothing that occurred in Stumpf's proceeding rendered the conviction unreliable. At most, the *existence* of Eastman's statement could be argued to have rendered the conviction unreliable, but then our analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background and which the court does not undertake. *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986) ("Motions for a new trial based on newly discovered evidence are disfavored."); see, e.g., *Herrera v. Collins*, 506 U.S. 390, 400, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) (stating the rule that habeas relief is not the proper remedy for a claim of judicial error based on newly discovered evidence, absent some constitutional flaw in the trial proceedings). It would indeed be bizarre if Eastman's statement could not undermine Stumpf's conviction by its own force, but introducing it into

another proceeding could do so. Following our court's decision, a prosecutor faced with the same dilemma in the future would be well advised not only to eschew reliance upon such potentially contradictory evidence in later proceedings, but presumably prevent any other prosecutor from doing so. He or she might even be forced deceitfully to disclaim a belief that a jury was entitled to hear such evidence. In sum, whatever the result might be were Wesley bringing the claim, I cannot agree to the principle of retroactive unconstitutionality propounded in this case.

II

With respect to Stumpf's claim attacking his guilty plea, the court's opinion appears to take no notice of the benefit that Stumpf in fact gained from pleading guilty. He first waived a jury trial, opting to contest the charges before a three-judge panel. He then pled guilty in return for the prosecution dropping some charges and specifications. It is axiomatic that acceptance of responsibility decreases the chances that the death penalty will be imposed. The sentencing court had three choices in sentencing Stumpf: life without parole for twenty years; life without parole for thirty years; and death. It made sound strategic sense for him to act in a way that would encourage the judges to choose one of the first two options.

Once Stumpf pled guilty, he was entitled to an evidentiary hearing before a three-judge panel to confirm that the evidence in the case supported his plea. Ohio Rev. Code Ann. § 2945.06. Under one strategic view of the facts, the panel might have been less likely than a jury to render a death verdict because it would have grasped the legal theory behind Stumpf's position that, while guilty of Mrs. Stout's murder, he was not actually the shooter, and therefore did not deserve the death penalty. Stumpf was arguably hoping for another benefit, namely the dismissal of the remaining specifications

to the charges against him that made him eligible for the death penalty. In Ohio "if the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice." Ohio R. Crim. P. 11(C)(3). Therefore, the majority is incorrect that Stumpf received no benefit at all from pleading guilty: he significantly improved his chances to avoid the death penalty, although in the end his strategy did not yield the desired result.

Despite the court's extensive exegesis of the "confusion" at the plea hearing itself, the events that took place at the sentencing hearing apparently were neither a surprise nor a disappointment, in the beginning, to the defendant or his counsel. In fact, the defense attorney stated that the prosecution's rendition of the plea agreement was accurate, (Maj. Op. at 16). No objection was made to the course of the sentencing hearing, nor was there any effort to withdraw the guilty plea at that point. It was only after the Eastman statement came to light that Stumpf attempted to withdraw his guilty plea. Similarly, at the "factual basis hearing" before the three-judge panel the defense did not attempt to say: "Wait a minute, we aren't able to make an argument that we thought we would be able to make at this stage." It made the argument. The three-judge panel heard and considered it. They simply were not persuaded.

Finally, it is true that Stumpf denied that he actually shot Mrs. Stout. Nevertheless, he knew that by pleading guilty, he would only be able to argue that Wesley in fact committed the murder as part of the mitigation phase of the proceedings. The majority asserts that there is evidence of a "serious misunderstanding," (Maj. Op. at 23), between the judge and Stumpf's lawyers. But no one was denying that Stumpf was involved in the murder of Mrs. Stout. His lawyers were laying the groundwork to argue that Stumpf was not the

triggerman and therefore did not deserve the death penalty. Stumpf would certainly be anxious to make that argument, and it is hardly surprising that, not knowing the precise point in the proceedings that it would be relevant, he would want to double-check that he would have an opportunity to argue this mitigating factor. The majority simply misinterprets Stumpf's caution as confusion.

Under these circumstances, it appears to me that Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3613

JOHN DAVID STUMPF, Petitioner-Appellant,
v.
BETTY MITCHELL, WARDEN, Respondent-Appellee.

Filed August 9, 2004

BEFORE: BOGGS, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

OPINION

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Judge Cook recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Chief Judge Boggs would grant rehearing for the reasons stated in his dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,
Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,
Respondent.

OPINION AND ORDER

Petitioner, a state prisoner sentenced to death by the State of Ohio following his plea of guilty to a charge of capital murder, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. On November 9, 1999, this Court issued an Opinion and Order finding that the following claims were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, 1:14, 3, and 5a. This matter is now before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the state court record for a determination of the merits of petitioner's remaining claims.[1] The facts of this case are set forth in the Opinion and Order of November 9, 1999, and will be repeated here only to the extent needed to provide context for petitioner's merits arguments.

* * *

[1] Also before the Court are supplemental briefs filed by the parties pursuant to an order from this Court dated September 11, 2000. (Order, 09/11/200, doc. no. 22).

Second Claim for Relief

In his second claim for relief, petitioner argues that his guilty plea was not knowing, voluntary, and intelligent. As more fully described in the Court's November 9, 1999 Opinion and Order, petitioner and another individual, Clyde Daniel Wesley, participated in an armed robbery during which the victim in this case, Mary Jane Stout, was shot and killed. Petitioner has consistently maintained that Wesley fired the shots that killed Mrs. Stout. He has also admitted, however, to his participation in the robbery, and to shooting Mrs. Stout's husband, who survived the attack. Petitioner asserts that he derived no benefit from pleading guilty to the capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand when he entered his guilty plea that he could still be sentenced to death, and that his counsel was ineffective for failing to advise him at that stage that he was not benefitting from the plea bargain and that he could still be sentenced to death. Petition at ¶¶38-47.

When a criminal defendant pleads guilty, he waives numerous fundamental constitutional rights --- including the right against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In light of the numerous fundamental constitutional guarantees that a defendant forfeits when he pleads guilty, the state has the burden to demonstrate that the plea is voluntary, intelligent, and knowing. *Id*; *see also Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Generally, a plea is voluntary if it is not induced by threats or misrepresentations and if the defendant is advised of the direct consequences of the plea. *Brady v. United States*, 397 U.S. 742; 755 (1970). A plea is intelligent

if the defendant understands the rights that he waives. *Boykin v. Alabama*, *supra*, 395 U.S. at 243.

A determination of the voluntariness and intelligence of a guilty plea must be made upon an analysis of the totality of the circumstances. *Garcia*, 991 F.2d at 327; *see also Berry v. Mintzes*, 726 F.2d 1142 (6th Cir.), *cert. denied*, 467 U.S. 1245 (1984). When a defendant later challenges the plea in federal habeas corpus on the ground that it was not voluntary, intelligent, and knowing, the state generally satisfies its burden by producing a transcript of the state court proceedings. *Garcia*, 991 F.2d at 326; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), overruled on other grounds by *Parke v. Raley*, 506 U.S. 20 (1992). A state court's factual finding that the plea was proper generally enjoys a presumption of correctness in federal habeas corpus. *Garcia*, 991 F.2d at 326; *Dunn*, 877 F.2d at 1277. But when the transcript is inadequate to show that a plea was voluntary and intelligent, the presumption of correctness is called into question. *Garcia*, 991 F.2d at 326; *see also Jones v. Parke*, 734 F.2d 1142, 1148 (6th Cir. 1984).

> Where the [guilty plea] is subsequently challenged, the state normally will attempt to demonstrate its effectiveness by introducing a transcript of the proceedings surrounding the trial court's acceptance of the guilty plea, and other trial court records. Where the records leave doubt as to whether the plea was in fact intelligent and voluntary, the state may look to evidence extrinsic to the court records, such as the recollection of those attending the plea proceedings. However, in the face of a record which is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance, the state must make a clear and convincing showing with

> extrinsic evidence that the plea was in fact intelligently and voluntarily entered.

Dunn v. Simmons, *supra*, 877 F.2d at 1277 (*citing Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cr.), *cert. denied*, 423 U.S. 917 (1975)).

The record of state court proceedings surrounding the accepting of petitioner's guilty plea, although not a picture of clarity, is relatively straightforward. The furthest that the proceedings strayed from "regularity" actually came prior to petitioner's entering his guilty pleas. Jury selection began on August 20, 1984, after the trial court heard arguments on and eventually overruled defense counsel's motion to suppress statements. Jury selection abruptly ended on August 23, 1984, however, when petitioner apparently waived a jury trial. The proceedings resumed on September 17, 1984 before a three-judge panel, with Presiding Judge Henderson reading into the record the written jury waiver that petitioner had signed and filed on August 23, 1984.[4]

Immediately after reading that statement into the record, the trial court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as they were set forth by the prosecuting attorney, are recounted here verbatim:

> MR SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7(D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under

[4] It does not appear that any colloquy ensued between the trial court and petitioner regarding his waiver of a jury trial.

> Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses -- the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of -- excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a. nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the

> Indictment and including the specification to the third count.

(Transcript, 09/17/84, at 6-7). When asked by the trial court whether he "affirmatively acknowledged" the agreement as stated by the prosecuting attorney, petitioner answered, "Yes, sir." (Tr., 09/17/84, at 8). The trial court granted leave to amend the indictment as indicated above, and petitioner apparently initialed those changes. (*Id.* at 10).

The trial court then engaged petitioner and his attorneys in a colloquy to determine that his guilty pleas were voluntary, intelligent, and knowing. When asked whether they had fully investigated the facts and law, determined whether there existed any question as to the admissibility of statements and other evidence, and informed the petitioner of the elements of the offenses, as well as defenses and constitutional rights available to him, petitioner's counsel answered, "Yes, we have." (*Id.* at 11). Petitioner, after being sworn, then answered a series of questions posed by the trial court regarding the nature of the charges against him and the federal constitutional guarantees that he was forfeiting. Most important for purposes of this discussion, was the following exchange:

> JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to being -- to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.

(*Id.* at 14). Later, the trial court asked:

> JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record.
>
> THE DEFENDANT: No, sir.

(*Id.* at 17-18). When the trial court then asked petitioner whether he was in fact guilty of the Aggravated Murder charge, defense counsel interrupted, at petitioner's behest, and explained that, although petitioner's answer would be "yes," it was petitioner's understanding that he would be given the opportunity to present evidence relevant to his conduct. (*Id.* at 18). Following that clarification, the trial court again asked petitioner whether he was "in fact guilty of the charge set forth in Count One, including specification one and specification four," to which petitioner responded, "Yes, sir." (*Id.* at 18-19).

After the plea colloquy, the trial court conducted an evidentiary hearing, as required under Ohio law with respect to guilty pleas in capital cases, to determine that there was a factual basis for petitioner's plea. The hearing, which began on September 18, 1984, concluded on September 20, 1984 with petitioner being found guilty of each offense to which he had pleaded guilty. Following the mitigation proceedings, the trial court reconvened on September 24, 1984 and sentenced petitioner to death on Count One.

Aside from the abrupt manner in which the trial proceedings shifted from jury selection to a three-judge panel facing a negotiated plea, the transcript of the proceedings surrounding petitioner's guilty plea suggests both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing. After the prosecuting attorney explained the plea agreement that had been reached, petitioner affirmatively acknowledged the agreement. (Tr., 09-17-84, at 6-8). Petitioner's attorneys affirmed on the record that they had investigated the facts and law relevant to the case, and had examined the admissibility of various statements and evidence. (*Id.* at 10-11). They further affirmed that they had informed petitioner of the elements of the offenses with which he was charged, of all the defenses that were available to him, and of all his constitutional rights. (*Id.* at 11). Petitioner personally acknowledged that his attorneys had informed and advised him as such. (*Id.* at 13). Petitioner also affirmed that he understood that, for the offense of aggravated murder, he was eligible for, among other penalties, death by electrocution. (*Id.* at 14). Later, he acknowledged an understanding that, regardless of what promises or inducements may have been made to him, punishment would ultimately be determined by the trial court and that the Court could impose the maximum sentence. (*Id.* at 17-18). Finally, petitioner answered that he was in fact guilty of the offense of aggravated murder -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to

explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (*Id.* at 18-19). Petitioner averred that he was not under the influence of drugs or alcohol, and the transcript does not suggest otherwise. (*Id.* at 13-14). All of the foregoing indicates a plea that was voluntary, intelligent, and knowing.

With respect to petitioner's argument that he derived no benefit from pleading guilty to the aggravated murder offense, that might appear, in hindsight, to be true. But criminal defendants who make solemn admissions and declarations under oath will not be permitted to challenge the voluntariness of an otherwise valid plea -- made with a professed understanding of the nature of the charges, the rights waived, and the direct consequences including the maximum possible sentence -- simply because they ultimately did not obtain the results they had desired.

> A guilty plea invariably is made without complete foresight of the possible outcome of alternative procedures that might have been undertaken. Thus, an accused, with the assistance of his attorney, must examine the evidence which the Government has amassed against him, consider possible defenses, weigh the costs and benefits of proceeding to trial and ultimately decide, in light of the information then available, whether to enter a guilty plea. There is no guarantee that the accused will make the correct decision or that in hindsight such plea will not reflect an error in fact or judgment. Such uncertainty, which after all is the linchpin of every plea bargain, is inherent in a guilty plea and does not make the plea involuntary.

United States v. Turner, 881 F.2d 684, 686-87 (9th Cir.), *cert. denied*, 110 S.Ct. 199 (1989) (*quoting Johnson v. United*

States, 539 F.2d 1241, 1243 (9th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977)). *See also McMann v. Richardson*, 397 U.S. 759, 769-771 (1970) ("a guilty plea is not rendered involuntary merely because in hindsight the defendant wishes he had chosen a different course of action."); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1097, 1098 (2d Cir. 1972) ("a defendant's mistaken subjective impressions gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were not reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea."), *cert. denied*, 410 U.S. 945 (1973).

As the Court noted above, petitioner affirmatively acknowledged his understanding of and agreement with the plea negotiations, as they were explained on the record by the prosecuting attorney. Ordinarily, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). That said, the Court acknowledges that the prosecuting attorney's explanation of the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that. Prophylactic colloquies designed to foreclose subsequent attacks are "neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam); see also *Machibroda v. United States*, 368 U.S. 487, 494-96 (1962); *Blackledge*, *supra*, 431 U.S. at 74-75; *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir.), *cert. denied*, 508 U.S. 943 (1993). However, the Court is faced with a transcript revealing a comprehensive colloquy between the trial court and petitioner, during which petitioner professed an understanding of the nature of the charges against him, the rights that he was waiving, and the direct consequences of his

plea -- including the maximum possible sentence, that being death. In light of the foregoing, petitioner's argument that he derived no benefit from the plea bargain does not persuade the Court that his plea was not voluntary and intelligent.

Another argument advanced by petitioner in support of his challenge to the validity of his guilty plea is that he never actually affirmed that he was guilty of the aggravated murder offense. Petitioner's assertion is belied by the record. As the Court discussed above, petitioner answered, when asked by the trial court whether he was in fact guilty of the offense of aggravated murder, that he was -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (Transcript, 09/17/84, at 18-19). That petitioner's attorney qualified petitioner's position with respect to the question of whether he was in fact guilty of aggravated murder does not diminish or otherwise undermine the answer that petitioner ultimately gave under oath -- namely, yes, that he was in fact guilty of aggravate murder. "[A] temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Garcia v. Johnson*, *supra*, 991 F.2d at 327. Petitioner will not now be heard to assert that he never actually affirmed that he was guilty of aggravated murder.

Petitioner also argues, in support of his challenge to the validity of his guilty plea, that he did not understand that he would still be eligible for the death sentence. Again, petitioner's assertion is belied by the record. As the Court discussed above, when the trial court asked petitioner whether he understood that, by pleading guilty to the aggravated murder offense and specifications, he would be eligible for a

life sentence with possibility of parole in twenty years, a life sentence with possibility of parole in thirty years, or death by electrocution -- petitioner answered, "yes, sir." (Transcript, 09/17/84, at 14). Later, petitioner acknowledged that he understood that, regardless of inducements or representations that may have been made to him, the trial court alone would decide his punishment- and the trial court could impose the maximum sentence. (*Id.* at 17-18). Petitioner gave his answers on the record and under oath. His after-the-fact assertion that the answers he gave then were false, while the assertions he makes now are true, is an insufficient basis for determining that his plea was not knowing or voluntary.

Further, petitioner was represented by counsel, and, no doubt, discussed possible sentences with his attorney. "[I]t taxes credibility to suggest that the paramount question of sentence, from the point of view of the accused, would have remained unexplored in the attorney/client conferences." *Berry v. Mintzes*, 726 F.2d 1142, 1149 (6th Cir.), cert. denied, 467 U.S. 1245 (1984). Defense counsel were well aware that petitioner was eligible for the death sentence. During the evidentiary hearing to determine that a factual basis existed for petitioner's guilty pleas, one of petitioner's attorneys noted in his opening statement that it was necessary to determine whether there was also a factual basis for the first specification to the aggravated murder count, "being the specification which does authorize the death penalty in this case." (Transcript, 09/17/84, at 35). It seems highly unlikely, in the absence of evidence to the contrary, that defense counsel did not apprise petitioner that he was eligible for the death penalty. Thus, above and beyond what is evident from the transcript of the plea colloquy -- namely, that petitioner stated under oath not once, but twice, that he understood that he was eligible for the death sentence -- the fact that petitioner was represented by counsel bolsters this Court's conclusion that possible sentences, including death, were discussed when

considering whether petitioner should enter a guilty plea to the aggravated murder sentence.

Petitioner further argues that his plea was not voluntary and intelligent, due to the ineffectiveness of his attorneys in not informing him that he would derive no benefit and that he would still be eligible for the death penalty. As discussed above, the Court must proceed with caution in the face of after-the-fact assertions that what petitioner said under oath during the plea colloquy was false, while what he asserts now is true. During the plea colloquy, petitioner's attorneys affirmatively acknowledged that they had advised petitioner of the nature of the charges that he faced, of his possible defenses, and of the rights that he was waiving. Petitioner, who was present during that exchange between the trial court and defense counsel, confirmed that his attorneys had advised and informed him as such. The Court has before it a transcript that indicates a knowing, intelligent, and voluntary plea. The only evidence that petitioner has introduced to challenge the validity of his pleas, as well as the apparent regularity of the state court proceedings, is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action. Although the Court is neither free, nor inclined, to disregard that affidavit altogether, that affidavit, without more, does not permit the Court to dismiss the validity of answers and a plea of guilty given by petitioner on the record and under oath. *See Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir. 1993), *cert denied*, 510 U.S. 180 (1994); *Dempsey v. Wainwright*, 471 F.2d 604, 607 (5th Cir.), *cert denied*, 411 U.S. 968 (1973); *see also Faught v. Cowan*, 507 F.2d 273, 275 (6th Cir. 1974), *cert denied*, 421 U.S. 919 (1975).

It is evident from the record that defense counsel's strategy was to demonstrate during the evidentiary hearing, as well as the mitigation hearing, that petitioner did not fire the shots that killed the victim, and that the death penalty, accordingly, was either not authorized or not appropriate. This

is amply demonstrated by the record, and petitioner has not sufficiently rebutted either the regularity of the plea proceedings, or that counsel's choices were borne from neglect and a dereliction of duty, as opposed to reasoned trial strategy.

For all of these reasons, the Court concludes that petitioner's second claim for relief is without merit.

* * *

Fifth Claim for Relief

In his fifth claim for relief, petitioner asserts ineffective assistance of appellate counsel on direct appeal to the Court of Appeals. Specifically, petitioner asserts that his appellate attorneys were constitutionally deficient for failing to raise the following issues on appeal:

5.1 That the trial court erred in failing to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements;

5.2 That the trial court erred in finding a sufficient factual basis for petitioner's guilty plea since, there is insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout;

5.3 That the trial court abused its discretion in failing to grant petitioner's request for a change of venue;

5.4 That the trial court abused its discretion in accepting petitioner's guilty plea without explaining the nature of the charge as

required by state rules of criminal procedure and constitutional law;

5.5 That the prosecutor made improper comments regarding the unsworn nature of petitioner's statement in mitigation;

5.6 Appellate counsel's failure to ensure that the presentence investigation report was made a part of the record on appeal; and

5.7 That trial counsel had been ineffective for failing to fully develop the record on the involuntary nature of petitioner's guilty plea.[12]

The Court will discuss the controlling standard for claims of ineffective assistance of appellate counsel and then address each of petitioner's allegations separately.

The Strickland test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel must provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (*quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Court of Appeals for the

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[12] As the Court noted in its earlier procedural default order, the habeas corpus petition includes two claims designated as the "fifth claim for relief." The first "fifth claim" is comprised of the allegations designated by the Court as 5.1 through 5.6. The only allegation of the second "fifth claim" that was properly presented to the state courts, and that is entitled to a review on the merits by this Court, is designated

Sixth Circuit has identified the following considerations that ought to be taken into account in determining whether counsel on direct appeal performed reasonably competently:

(1) Were the omitted issues "significant and obvious?"
(2) Was there arguably contrary authority on the omitted issues?
(3) Were the omitted issues clearly stronger than those presented?
(4) Were the omitted issues objected to at trial?
(5) Were the trial court's rulings subject to deference on appeal?
(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
(7) What was appellate counsel's level of experience and expertise?
(8) Did the petitioner and appellate counsel meet and go over possible issues?
(9) Is there evidence that counsel reviewed all the facts?
(10) Were the omitted issues dealt with in other assignments of error?
(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999). The Sixth Circuit cautioned, however, that this list is not exhaustive and need not produce a certain "score." *Id* at 428. The Court will now turn its attention to each allegation of appellate counsel ineffectiveness asserted by petitioner.

* * *

5.2 Trial Court's Determination That There Was Factual Basis for Guilty Plea

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to challenge on appeal the trial court's determination that there was a sufficient factual basis to support petitioner's guilty pleas. Specifically, petitioner asserts that specific intent is the requisite culpability and that there was insufficient evidence, demonstrating that he possessed specific intent to kill the victim. Petitioner argues, therefore, that his attorneys were ineffective for not challenging on appeal the trial court's determination that there was a factual basis supporting his guilty pleas to aggravated murder and the "escaping detection" specification.

The Court is not persuaded that petitioner's attorneys were ineffective in this regard. Although the issue whether there was a sufficient factual basis supporting petitioner's guilty pleas seems, at first glance, to be an obvious issue for, appeal, given the fact that petitioner steadfastly maintained, even while pleading guilty, that it was his co-defendant Daniel Wesley, who had actually shot and killed Mrs. Stout, it cannot be said under Strickland that petitioner's attorneys were constitutionally deficient, or that petitioner was prejudiced, by the omission of this issue from the appeal. Initially, it bears repeating, with respect to petitioner's insistence that his co-defendant was the triggerman, that petitioner pleaded guilty to the offense of aggravated murder and the "escaping detection" specification. That is, petitioner stood in open court and stated, under oath, that he had purposely killed Mrs. Stout and that he had done so for the purpose of escaping detection, apprehension, trial, or punishment for the offense of aggravated robbery. Moreover, there was circumstantial evidence and testimony placing the murder weapon in petitioner's hand and establishing

petitioner as the one who fired the fatal shots."[15] With that in mind, the Court notes first that counsel may very well have elected not to challenge the factual basis for petitioner's guilty plea, since there was sufficient evidence from which a reasonable factfinder could have found, beyond a reasonable doubt, specific intent to kill. Evidence and testimony revealed a methodical, calculated entrance into the Stout home by petitioner and Wesley for the purpose of committing robbery; that multiple gunshots were fired into the heads of Mr. and Mrs. Stout at point blank range; that petitioner and Wesley had reason to fear that they wold be identified by the Stouts; and that petitioner and Wesley fled the Stouts' home, leaving them to die. Thus, counsel may very well have determined that this issue was not stronger than the issues they ultimately presented on appeal. *Mapes*, *supra*, 171 F.3d at 427-28. Moreover, the issue of whether there was a sufficient factual basis supporting petitioner's guilty pleas to aggravated murder and the "escaping detection" specification were essentially dealt with in other assignments of error concerning the trial court's decision not to permit petitioner to withdraw those guilty pleas. Id. Having reviewed the record, the Court cannot say that the decision not to pursue this issue on appeal was "an unreasonable one which only an incompetent attorney would adopt." Id. For these reasons, the Court rejects petitioner's claim that his attorneys on appeal were ineffective for failing to assign as error the trial court's determination that there was a factual basis supporting petitioner's guilty pleas.

* * *

5.4 Trial Court's Failure to Explain Nature of Charge

[15] The Court is mindful, just as the state courts were, of affidavits and transcripts from the subsequent trial of Clyde Daniel Wesley, filed by petitioner in support of his motion to withdraw his guilty plea, attempting to show that Wesley had confided to a cellmate that he, and not petitioner, had actually killed Mrs. Stout.

When Accepting Guilty Plea

Petitioner argues in claim 5.4 that his appellate attorneys were ineffective for failing to challenge on appeal the fact that the trial court accepted petitioner's guilty plea without explaining the nature of the charges to which he was pleading guilty; Although there arguably is some substance to petitioner's allegations, the Court is not persuaded that petitioner was prejudiced by appellate counsel's oversight.

The first prong of the Strickland test requires the Court to determine whether counsel committed an error or omission that was objectively unreasonable. The Court accomplishes this task by examining whether the issue omitted from the appeal was not only viable, but one that no competent attorney reasonably would have foregone. Under Ohio law, a trial court's responsibilities in ensuring that a guilty plea is made voluntarily are spelled out in Ohio R. Crim. P. 11 (C)(2):

> In felony cases the court *** shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved***.
>
> (b) Informing the defendant and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testier against himself or herself.

The Ohio Supreme Court has held that, although strict compliance with Rule 11(C)(2) is preferred, substantial compliance is sufficient, so long as the totality of the circumstances demonstrate that the plea was voluntary. *State v. Carter*, 60 Ohio St. 2d 34, 38 (1919); *State v. Stewart*, 51 Ohio St. 2d 86 (1977). With respect to ensuring that a defendant enters a guilty plea "with understanding of the nature of the charges," although Ohio courts have stopped short of requiring trial courts to explicitly inform the defendant of each element of the offense or to specifically ask the defendant if he understands the nature of the charge, there must be some basis in the record justifying a finding by the trial court that the defendant understands the charge. See *State v. Rainey*, 3 Ohio App. 3d 441 (Ohio app. 10 Dist. 1982); *see also State v. Blair*, 128 Ohio App. 3d 435 (Ohio App. 2 Dist. 1998)(defendant's affirmative response to whether he understood nature of attempted rape charge against him was, by itself, insufficient to support finding that he understood what state would have to prove where there was nothing in record to support finding that defendant was advised, by anyone, of what state would have to prove to convict him); *In re Flynn*, 101 Ohio App. 3d 778 (Ohio App. 8 Dist. 1995)(trial court is not required to inform defendant of each element of the offense, but must ensure that defendant understands the charge); *State v. Swift*, 86 Ohio App. 3d 407 (Ohio App. 11 Dist. 1993)(trial court is required to clear up

confusion on defendant's part as to element of crime before it can accept guilty plea).

In the instant case, it appears that the trial court substantially complied with Ohio R. Crim. P. 11(C)(2) when accepting petitioner's guilty pleas. The trial court informed petitioner of the constitutional, rights to which he was entitled and ensured that he understood he was waiving those rights; inquired whether petitioner was under the influence of drugs, alcohol, or mental defect that might impair his voluntariness; advised petitioner of the maximum penalties that he faced; inquired whether petitioner's guilty pleas had been obtained through promises, inducements, or threats; and, inquired whether petitioner had discussed his plea and was satisfied with his attorneys. (Mitigation transcript, at 11-18). The trial court did not inquire into petitioner's educational background in ascertaining whether he was capable of understanding the charges to which he was pleading guilty or the consequences of his guilty pleas. The trial court also failed to inform petitioner of the elements of the charges to which he was pleading or to inquire whether he understood the charges. The trial court did, however, inquire of petitioner's attorneys whether they had explained the elements of the offenses to petitioner. (Mitigation transcript, at 11). From the plea colloquy as a whole, there appears to be a basis in the record justifying the trial court's finding that petitioner entered his guilty pleas "with full knowledge of the nature of the accusation and the consequences of the pleas," (Mitigation transcript, at 23), though that basis appears to have been somewhat scant.

Further, there were intimations at the time that petitioner entered his guilty pleas, as well as outright declarations in his subsequent appeals and collateral attacks, that petitioner did not fully grasp the nature of the charges to which he was pleading guilty. During the plea colloquy, when the trial court asked petitioner whether he was in fact guilty of the

aggravated murder charge and specifications one and four to that charge, petitioner did not immediately answer, prompting defense counsel to interject:

> MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of the his right to present evidence at a later time relative to his conduct, but he'll respond to that.

(Mitigation transcript, at 18). After petitioner's pleas had been accepted and petitioner had been sentenced to death, when petitioner later sought to withdraw his plea and to attack his conviction and sentence in postconviction, he asserted, (as he continues to assert here), that he did not understand that he was admitting to the actual shooting of Mary Jane Stout and that he only pleaded guilty because he was led to believe that he would be able to present evidence demonstrating that he was not the shooter, *i.e.*, the principal offender.

The trial court's failure to explain more fully the nature of the charges is fairly characterized as a non-frivolous, viable issue worthy of appeal. The trial court did not notify petitioner of the elements of the offenses to which he was pleading guilty and did not specifically ask him whether he understood the charges. The only basis supporting the trial court's finding that petitioner understood the nature of the charges was defense counsel's affirmative response to the trial court's question as to whether counsel had explained the elements of the offenses to petitioner. That petitioner denied being the actual shooter, or principal offender, was evidenced first in his reluctance to answer when the trial court asked whether he was in fact guilty of shooting Mrs. Stout and then throughout the hearing to determine whether there was a factual basis for his pleas, when he fought to establish that it as his co-defendant, and not he, who had actually shot Mrs. Stout. The

foregoing suggests that appellate counsel omitted a significant and obvious issue when they failed to assign as error the trial court's failure to explain the nature of the charges when it accepted petitioner's guilty plea. A tactical reason for not raising this issue on appeal is not readily apparent. It is likewise difficult to characterize this issue as one that a competent attorney could understandably overlook. Hence, petitioner has arguably satisfied the deficient performance prong of the Strickland test.

It is not enough, of course, for petitioner to demonstrate that appellate counsel's conduct fell below that of a reasonable attorney under prevailing professional norms. Petitioner must also show that, but for appellate counsel's error, the appeal would have resulted in a different outcome. *Strickland*, *supra*, 466 U.S. at 694; *Tucker v. Prelesnik*, 181 F.3d 747, 754 (6th Cir. 1999). The prejudice inquiry has been defined in terms of whether counsel's errors were so egregious as to undermine reliability of and confidence in the result of the proceedings. *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied*, 521 U.S. 1131 (1997); *see also Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993). The prejudice prong serves an important function -- namely, to ensure that otherwise valid criminal judgments are not lightly overturned because of attorney error that, in the end, did not prejudice the rights of the defendant or undermine the confidence in or reliability of the proceeding. *Cf. Lockhart*, *supra*, 506 U.S. at 368-69 (holding that the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on ability of the accused to receive a fair trial). Under the prejudice prong, even assuming that appellate counsel could objectively be faulted for not raising the trial court's failure to explain the nature of the charges, the Court cannot find that petitioner was prejudiced by that error because it does not appear that the state courts in this case would have accepted petitioner's argument about the trial court's failure to instruct on the elements of the offense. That

is, the Court cannot find that appellate counsel's failure to raise that issue undermined the reliability of the outcome of petitioner's appeal. This Court finds that appellate counsel's failure to challenge the fact that the trial court did not explain the nature of the charges does not undermine the reliability of or confidence in the result of petitioner's appeal.

As noted supra, the failure of a trial court to use, the exact language contained in Ohio R. Crim. P. 11(C) does not provide a basis for vacating the appeal. *See State v. Anderson*, 108 Ohio App. 3d 5, 9 (Ohio App. 9 Dist. 1995). "With respect to constitutional rights, the trial court's acceptance of a guilty plea will be affirmed if the court engaged in a meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id* (*quoting State v. Ballard*, 66 Ohio St. 2d 473, paragraph two of the syllabus (1981)). So long as the totality of the circumstances demonstrate a basis for the trial court's finding that the defendant understood the nature of the offense to which he was pleading guilty, the failure of the trial court to explicitly ask whether the defendant understood the nature of the offense does not provide a basis for attacking the constitutionality of the plea. *See, e.g., State v. Rainey*, 3 Ohio App. 3d 441, paragraph two of the syllabus (Ohio App. 10 Dist. 1982). The record reveals that the trial court received assurances from defense counsel that the nature and elements of the offense had been explained to petitioner and that petitioner was entering his guilty plea with a full understanding of the nature of the offense. That being so, it is highly unlikely that the state appellate court would have accepted petitioner's arguments about the failure of the trial court explicitly to ask him whether he understood the nature of the offense. *State v. Carter*, 60 Ohio St. 2d 34 (1974)(finding no error where trial counsel had given assurances that defendant understood nature of offense to which he was pleading guilty). Even assuming, therefore, that

appellate counsel erred in not raising this issue on appeal, appellate counsel's omission did not prejudice petitioner. The Court is constrained to rejected claim 5.4.

* * *

5.7 Trial Counsel's Failure to Develop Record re: Voluntariness of Plea

Finally, petitioner asserts that his appellate attorneys were constitutionally ineffective for not challenging on appeal the failure of petitioner's trial attorneys, in connection with petitioner's motion for a new trial, to develop more fully evidence demonstrating that petitioner's pleas were not entered knowingly, intelligently, or voluntarily. For reasons discussed more fully above, the Court is not persuaded that appellate counsel omitted an issue of significant and obvious strength because it is clear from the decisions of the appellate court and the Supreme Court of Ohio that they conducted a full review of the circumstances surrounding petitioner's guilty plea, and of the subsequent allegations regarding the fact that petitioner's co-defendant escaped a death sentence following his trial, and concluded that-petitioner's plea had been voluntary and that petitioner was not entitled to withdraw his plea. That being so, it cannot be said that appellate counsel unreasonably ignored an issue significantly and obviously stronger than those appellate counsel did raise on appeal, or that petitioner was prejudiced by the omission.

* * *

Seventh Claim for Relief

In his seventh claim for relief, petitioner asserts that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which

evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. According to Wesley's cellmate, Wesley had confessed to him that, after petitioner shot Mr. Stout with the chrome .25 caliber pistol, petitioner dropped that pistol and ran. Wesley then picked up the pistol and shot Mrs. Stout. Petitioner argues that the new evidence, *i.e.*, the testimony of Wesley's cellmate implicating Wesley as the actual shooter, entitled petitioner to withdraw his guilty plea or, in the alternative, to have a new sentencing hearing. By far the most troubling of petitioner's claims, this assertion, along with a recent decision by the Court of Appeals for the Eighth Circuit prompted the Court to order the parties to submit supplemental briefs.

In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied*, *Gammon v. Smith*, -- S.Ct.-- 2000 WL 1337423 (Nov. 6, 2000), the Eighth Circuit granted a writ of habeas corpus because the state had violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain the convictions of two different defendants for the same murders. During the petitioner's trial, the prosecution relied on one of a co-defendant's two inconsistent versions of the events to obtain petitioner's conviction for the murders, and then relied on the other version at a subsequent trial to convict someone else of the same murders. Pointing to the prosecution's use of "diametrically opposed testimony" during different trials to obtain convictions of different defendants for the same murders, as well as the fact that the petitioner could not have been convicted of felony murder under both theories, the Eighth Circuit found that the prosecution's actions rose to the level of a due process violation.

After the decision in *Smith v. Groose*, this Court directed the parties to file supplemental briefs addressing

whether, or to what extent, the Eighth Circuit's decision might apply to petitioner's case. Petitioner argued that his conviction violates his rights under the Due Process Clause and must be set aside because the prosecution secured convictions against him and subsequently against Clyde Daniel Wesley by arguing that each had been the actual shooter. Respondent asserted that *Smith v. Groose* does not apply to petitioner's case since petitioner could have been convicted and sentenced to death even under the arguments and evidence that were presented during Wesley's subsequent trial, as an aider and abettor; neither the aggravated murder count nor the capital specification to which petitioner pleaded guilty required that he be the principal offender. The Court is constrained to agree.

The factually inconsistent and irreconcilable evidence at issue concerns who was the actual shooter, i.e., petitioner or Clyde Daniel Wesley. During petitioner's culpability and penalty hearings, the state argued that petitioner shot and killed Mary Jane Stout. Later, during Wesley's trial, the state argued and presented testimony that Wesley shot and killed Mary Jane Stout. The critical difference between this case and Smith is that here, it was not necessary for the state to argue or prove beyond a reasonable doubt, nor was it necessary for the trial court to find, that petitioner was the actual shooter, *i.e.*, "principal offender." That is, petitioner

could have been convicted and sentenced to death as charged under the arguments and testimony presented during Wesley's trial.

Neither the aggravated murder count, nor the capital specification to which petitioner pleaded guilty, included as an element that petitioner was the actual shooter or "principal offender." Petitioner's indictment did not include a complicity, *i.e.*, aiding and abetting, count. Indeed, all indications from petitioner's indictment were that the state would proceed against petitioner as the actual shooter. Thus, petitioner's indictment was silent as to whether the state would proceed against him as the principal offender or as an aider and abettor. Under Ohio's aiding and abetting statute, however, it is not necessary for a defendant be charged as an aider and abettor to be convicted under aider and abettor liability; that a defendant is charged with a criminal offense is considered sufficient to place him on notice that the state could seek to convict him as either the principal offender or and aider and abettor. Subsection (F) of Ohio's aiding and abetting statute provides in relevant part that a charge of complicity may be stated in terms of that section or in terms of the principal offense. R.C. §2932.03(F). Ohio courts have construed R.C. §2923.03(F) to mean that a complicity conviction will be sustained under an indictment solely employing terms of the principal offense without an amendment to the indictment. *State v. Ensman*, 77 Ohio St 3d 701, paragraphs one, two, and six of the syllabus (1991); *see also State v. Dotson*, 35 Ohio App. 3d 135 (Ohio App. 3 Dist. 1987)(holding that complicity statute allows defendant to be indicted either as the principal offender or as aider and abettor because statute gives sufficient notice that state could proceed against defendant under either theory).

Citing *State v. Taylor*, 66 Ohio St. 3d 295 (1993), petitioner asserted that, under Ohio law, a defendant convicted of aggravated murder and a capital specification

under aiding and abetting liability is not eligible for the death penalty. His assertion is not entirely accurate and his reliance on Taylor is misplaced. In Taylor, the defendant argued that the evidence was insufficient to establish the R.C. §2929.04(A)(7) death penalty specification attached to each aggravated murder count of which he had been convicted under aiding and abetting liability. The death penalty specification set forth in RC. §2929.04(A)(7) requires proof either that, the defendant was the principal offender or, if the defendant was not the principal offender, that the aggravated murder was committed with prior calculation and design. The defendant in Taylor argued that there was no proof either that he was the principal offender or that the aggravated murder was committed with prior calculation and design. The Supreme Court of Ohio agreed. With respect to the "principal offender" element, the court held that, while a defendant can be convicted of aggravated murder without being the actual killer, but by aiding and abetting the actual killer, such a finding cannot be "bootstrapped" into a finding that the defendant was the principal offender for purposes of making him eligible for the death penalty under R.C. §2929.04(A)(7).

Petitioner's reliance on Taylor is therefore misplaced, since neither the aggravated murder count, nor the death penalty specification, to which petitioner pleaded guilty required as an element proof that petitioner was the "principal offender." That is, even assuming that petitioner was convicted of the aggravated murder of Mary Jane Stout, not because he was the actual shooter, but because he aided and abetted the actual shooter, such a finding was not "bootstrapped" into a finding of any of the essential elements of the death penalty specification to which he pleaded guilty, *i.e.*, that the offense was committed to avoid detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder.

The circumstances surrounding petitioner's conviction, and that of Clyde Daniel Wesley, do not fall squarely within the holding of *Smith v. Groose*. Since petitioner could have been convicted and sentenced to death as charged, even under the arguments and evidence subsequently presented by the state during Clyde Daniel Wesley's trial, the Court is constrained to find that the state's actions of arguing during and petitioner's hearing that he was the actual shooter, and then at Wesley's trial that Wesley was the actual shooter, did not violate petitioner's rights under the Due Process Clause.

That said, the Court is still troubled by the possibility that the state secured petitioner's death sentence by arguing that petitioner was the actual shooter, and then prosecuted Clyde Daniel Wesley as the actual shooter. As noted above, although the state was not required to prove that petitioner was the actual shooter, and the trial court was not required to find that petitioner was the actual shooter, the fact remains that the state did argue that petitioner was actual shooter and the trial court did find that petitioner was the actual shooter. In fact, the trial court cited its finding that petitioner was the actual shooter as a reason, and a very substantial reason, why the aggravating circumstance outweighed the mitigating factors.

As troubling as this fact is, however, it does not warrant habeas corpus relief because the Supreme Court of Ohio appears to have cured any misplaced reliance on the petitioner's having been the actual shooter. The Supreme Court, which is required to weigh independently the aggravating circumstances against the mitigating factors, considered the testimony of Clyde Daniel Wesley's cellmate -- testimony the petitioner complained was unavailable when the trial court made its sentencing decision -- and found that the testimony was insufficient to tip the scales against imposition of death. In its discussion of the existence and weight any of the mitigating factors set forth in R.C.

§2929.04(B), the Supreme Court stated, "we find that the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of [Stumpf]'s guilty plea and the substantial evidence to the contrary adduced during [Stumpf]'s sentencing hearing." *Stumpf, supra*, 32 Ohio St. 3d at 106. Thus, even assuming that the state's argument and trial court's finding that petitioner was the principal offender provided a basis for the trial court's determination that the aggravating circumstance outweighed the mitigating factors, the Supreme Court of Ohio cured any potential flaw by independently determining that the aggravating circumstance outweighed the mitigating factors, even in light of the testimony by Wesley's cellmate.

For the foregoing reasons, the Court finds that petitioner's seventh claim for relief is without merit

* * *

Conclusion

In an earlier Opinion and Order, this Court found that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. For the foregoing reasons, the Court finds that petitioner's remaining claims are without merit. Accordingly, all of petitioner's claims are DENIED and this action is hereby DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with his supplemental brief filed on October 2, 2000, (doc.no. 24, at 2 n.2), and within thirty days from the date of this order, the transcript from Clyde Daniel Wesley's trial. To the extent that petitioner has moved to file a supplemental brief on the merits of petitioner's claims, (doc.no. 24, at 1 fn.1), that motion is DENIED as moot.

/s/GEORGE C. SMITH
United States District Judge

Date: 2/6/01

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Final judgment dismissing petitioner's death penalty habeas corpus action was entered by this Court on February 7, 2001. This matter is before the Court upon petitioner's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. Also before the Court is respondent's memorandum in opposition.

Rule 59(e) of the Federal Rules of Civil Procedure, allows parties, within ten days of the date of a judgment, to request the Court to alter or amend that judgment. Rule 59(e) relief is available to correct a clear error of law, to give effect to an intervening change in controlling law or newly discovered evidence, or to prevent a manifest miscarriage of justice. *Gencorp, Inc v. American International Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999), *rehearing and suggestion for rehearing en banc denied* (Jul. 26, 1999). A motion to alter or amend judgment pursuant to Rule 59(e) is not an opportunity to re-argue the same facts, law, or evidence. Thus, a Rule 59(e) motion should not be used to present arguments

that could, and should, have been raised during the litigation. *Sault Ste. Marie Tribe of Chippewa Indians* v. *Engler,* 146 F.3d 367, 374 (6th Cir. 1998). "Where the movant is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal. (citation omitted)." *Keweenaw Bay Indian Community v. Michigan.* 152 F.R.D. 562. 563 (W.D. Michigan 1992). *aff'd,* 11 F.3d 1341 (6th Cir. 1992).

Petitioner asserts that the Court's *Opinion and Order* contained clear errors of law with respect to his fourth and seventh claims for relief. Petitioner argued in his fourth claim for relief that his attorneys were constitutionally ineffective during the penalty phase of his case.'[1] In his seventh claim for

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[1] There were seven sub-parts to petitioner's fourth claim:

4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them:

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

relief, petitioner asserted that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. Respondent argues that petitioner has failed to demonstrate newly available evidence, a change in the law, or a clear error in this Court's *Opinion and Order* that would warrant Rule 59 relief.

Claim Four

Petitioner argues that he is entitled to Rule 59(e) relief as to his fourth claim for relief because this Court erred, under the legal standards set forth in *Strickland* v. *Washington,* 466 U.S. 668 (1984), and *Terry Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495 (2000), in rejecting petitioner's claim of trial counsel ineffectiveness during the penalty phase. Petitioner argues that, because of a mistaken belief that petitioner would be spared the death penalty if he pleaded guilty to aggravated murder and only one death penalty specification, defense counsel failed to properly prepare and present available mitigation evidence during the sentencing phase of the trial. The mistaken belief that caused defense counsel to begin mitigation preparation only two weeks before the penalty hearing, to fail to consult a psychologist, and to fail to call as witnesses numerous family members and friends who were present and available during the penalty hearing, was a 'tactic," according to petitioner, that fell outside the wide

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4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

range of prevailing norms for capital defense attorneys. The result of counsel's deficient performance, petitioner contends, was a breakdown in the adversarial process sufficient to undermine confidence in the reliability of his sentence.

Petitioner has not demonstrated a clear mistake of law or fact, or the need to correct a manifest miscarriage of justice that would warrant Rule 59 relief as to his fourth claim. Petitioner has cited several cases that, although not cited by the Court in its *Opinion and Order,* offer holdings with which this Court's reasoning and findings are not inconsistent. The two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984),[2] governs claims of ineffective assistance of counsel and, this Court adhered to the *Strickland* test in considering every aspect of petitioner's fourth claim for relief. Petitioner also lays out factors and arguments that this Court *did* consider, and then simply urges the Court to change its mind.

In summarizing the standard of review for penalty phase ineffectiveness claims, petitioner cites not only *Strickland,* but also relies heavily on the Supreme Court's recent decision of *Williams v. Taylor,* 529 U.S. 352 (2000). There, the Supreme Court held that the petitioner was entitled to relief on his

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[2] The *Strickland* Court held:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

claim of trial counsel ineffectiveness during the penalty phase of his capital trial and that the State supreme court, in finding otherwise, "rendered a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. (internal quotation marks omitted)." *Williams,* 529 U.S. at 398-99. In so holding, the Supreme Court noted that counsel did not begin the mitigation preparation until a week before the penalty hearing and that, counsel failed to uncover and present records detailing the petitioner's horrid childhood, borderline mental retardation, assistance provided by petitioner to prison authorities, and testimony touting petitioner's amenability to structured prison life. *Williams,* 529 U.S. at 395-96. Nothing within the *Williams* decision diminishes or otherwise alters the applicability of *Strickland* and, petitioner does not appear to suggest otherwise. Instead, the sole basis of petitioner's extensive reliance on *Williams* appears to center on petitioner's assertion that, "[t]he conduct of defense counsel in the Petitioner's trial is every bit as egregious as that in Terry Williams." (Petitioner's Motion, doc.no. 29, at 9).

Petitioner also relies to a lesser extent on the Sixth Circuit's decision in *Glenn v. Tate,* 71 F.3d 1204 (6th Cir. 1995), *cert. denied,* 519 U.S. 910 (1996). In that case, the Sixth Circuit held that the petitioner was denied effective assistance of counsel during the penalty phase of his capital trial. The Court pointed to the lack of time spent by counsel preparing for the mitigation hearing, counsel's failure to investigate and present readily available information regarding the petitioner's history, character, background, and organic brain damage, and counsel's failure to object, due to their lack of preparedness, to devastating testimony that petitioner's offense was *not* the product of psychosis, mental retardation, organic brain disease, or other mental illness. *Id.* at 1207-1209. Post-sentencing hearings revealed that petitioner had been classified in school as mentally retarded, and that he suffered from global brain damage which, in the

opinion of one neuropsychologist, prevented the petitioner from having the substantial capacity to conform his conduct to the requirements of the law, *Id.* at 1207-1208.

Finally, petitioner cites the decision in *Morales v. Coyle,* 98 F.Supp.2d 849 (ND. Ohio 2000). In that case, the Court originally entered judgment denying the petitioner's habeas corpus claims. The Supreme Court's decision in *Williams v. Taylor, supra,* then issued, prompting Petitioner Morales to file a motion seeking Rule 59 relief. The Court granted the petitioner's motion as to his claim of the denial of effective assistance of counsel during the penalty phase of the petitioner's capital trial, finding that the penalty phase errors alleged by Petitioner Morales were "strikingly similar" to those that formed the basis for relief in *Williams. Morales*, 98 F.Supp.2d at 894.[3]

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[3] The Court wrote:

The Petitioner has succinctly set forth the areas in which his trial counsel were deficient in failing to investigate and prepare available mitigation evidence in his Motion to Alter or Amend. They are as follows:

—Trial counsel did not interview any members of the Petitioner's family.

—Trial counsel did not interview any of the Petitioner's friends or anyone else who knew him.

—Trial counsel did not search any records pertaining to the Petitioner's education, health, mental problems, or juvenile offenses.

—Trial counsel failed to seek the assistance of an expert to prepare a mitigation strategy.

—Trial counsel failed to adequately prepare the Petitioner to make an unsworn statement in the penalty phase of the trial.

—Trial counsel failed to adequately investigate the Petitioner's cultural background and the effect it had on the Petitioners life.

In *Cone v. Bell*, -- F.3d --, 2001 WL 276998 (6th Cir. Mar. 22, 2001), the Court of Appeals for the Sixth Circuit recently granted habeas corpus relief due to the failure of the petitioner's trial counsel to provide effective assistance during the sentencing phase of the petitioner's trial. There, defense counsel not only failed to present any mitigation evidence during the sentencing phase, but also declined to make any argument during the sentencing phase. Rejecting the various explanations offered by defense counsel, the Sixth Circuit concluded that, "[t]his was not 'strategic' representation; it was nonrepresentation of the most deadly sort." *Id.* at * 17.

Even according petitioner every possible benefit of the doubt, the Court is not persuaded that counsel's performance in connection with the penalty phase of petitioner's trial remotely approached the deficiencies and nonfeasance that characterized the penalty phase performances described in *Williams, Glenn, Morales,* or *Cone.* Petitioner's trial attorneys fashioned a mitigation theory based on emphasizing residual doubt and exposing petitioner as a trusting, misguided follower in the criminal offenses; conducted mitigation investigation; utilized social workers to collect background information and interview family, friends, teachers, employers, and acquaintances; and presented evidence and argument to support their mitigation strategy. The

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—Trial counsel failed to investigate the possibility of a neurological cause of the Petitioner's mental and emotional deficiencies due to his lifelong alcohol consumption. Moreover, trial counsel did not request any time between the jury's finding of guilt and the commencement of the penalty phase of the trial to investigate any potential mitigating evidence and to prepare a mitigation strategy. Trial counsel proceeded with the penalty phase the day after the guilty verdict.
Morales, 98 F.Supp.2d at 898-99.

performance of the attorneys in *Williams*, *Glenn*, *Morales*, and *Cone*, in contrast, amounted to virtual nonrepresentation. Thus, petitioner has not demonstrated any clear errors of law in the Court's disposition of his fourth claim for relief that would require Rule 59 relief.

Nor has petitioner demonstrated any clear errors of fact or the need to correct a manifest miscarriage of justice. As the Court noted above, many of the factors presented by petitioner in his motion for Rule 59 relief *were* considered and rejected by this Court. With respect to petitioner's argument that trial counsel erred in failing to obtain a psychologist for the mitigation hearing, the Court noted that the nature of the information gathered by Dr. Eisenberg during his post-sentence evaluation of petitioner has been viewed by the Supreme Court of Ohio as valuable mitigation evidence. The Court also noted that the information could have come in under the "catch-all mitigation factor set forth in §2929.04(B)(7), even if the information was insufficient to qualify under the "mental disease or defect" factor set forth in §2929.04(B)(3). Further, the Court acknowledged that the information gathered by Dr. Eisenberg may have contributed to, or at least would not have been inconsistent with, the primary mitigation theory that defense counsel pursued -- namely, that petitioner was not the actual shooter. As the Court noted above, a Rule 59(e) motion is not an opportunity to re-argue the same facts, law, or evidence. "Where the movant is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal. (Citation omitted)" *Keweenaw Bay Indian Community v. Michigan,* 152 F.R.D. 562, 563 (W.D. Michigan 1992), *aff'd,* 11 F.3d 1341 (6th Cir. 1992).

Unlike the attorney actions and omissions in *Williams, Glenn*, and *Morales*, the failure by petitioner's attorneys to utilize a psychologist was the product not of unjustifiable

oversight or indolence but of a tactical decision based on the fact that Petitioner Stumpf had exhibited no signs of psychological problems, that the psychological evidence was not consistent with and actually might have diluted their mitigation theory, and on misgivings about unleashing potentially prejudicial information to prosecutors and the three-judge panel. Hindsight revealed that counsel could have gathered relevant and arguably helpful information had they utilized a psychologist. But, as the Court noted in its *Opinion and Order*, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra,* 466 U.S. at 689. Petitioner has failed to demonstrate, and the Court is not otherwise persuaded, that its original decision rejecting this issue requires Rule 59 relief.

With respect to petitioner's renewed argument that defense counsel began their mitigation preparation too late, this Court reiterates that there is no hard and fast rule governing when mitigation preparations should begin. Neither *Williams, Glenn,* nor *Morales* purported to establish or follow such a rule; those cases merely noted inadequate mitigation preparation time as one of many factors that resulted in a deficient performance on the part of defense counsel during the penalty phase. Thus, petitioner's argument that he is entitled to Rule 59 relief on this issue must fail.

As for the investigation and preparation of witnesses, this is not a case such as *Williams, Glenn,* or *Morales,* where defense counsel did next to nothing in the way of collecting character and background information. Petitioner's defense attorneys actually collected quite a bit of information about petitioner's character, childhood, education, employment, and relationships. According to petitioner's argument in support of Rule 59 relief, counsel simply failed to call the right

witnesses or enough witnesses. That argument is insufficient on its face to warrant Rule 59 relief.

Finally, petitioner challenges the Court's decision rejecting his claim that defense counsel were constitutionally ineffective for failing to object to the admission of victim impact evidence. Petitioner argues that Ohio created a statutory bar against the admission of victim impact evidence, thereby creating a liberty interest in preventing the admission of such evidence. Petitioner also appears to dispute this Court's interpretation of *Payne v. Tennessee,* 501 U.S. 808, 826 (1991), where the United States Supreme Court held that the Eighth Amendment erects no *per se* bar if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject. The Court concluded that, even assuming the admission of victim impact erroneous, petitioner suffered no prejudice because such evidence was limited, scattered, benign, and, by all indications, went unconsidered by the three-judge panel. That being so, petitioner has failed to point to a clear error of law or fact requiring Rule 59 relief in this regard.

Petitioner's motion to alter or amend the Court's judgment denying his fourth claim for relief must be denied.

Claim Seven

Petitioner argued in his seventh claim for relief that the trial court erred in denying his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. That new, previously unavailable evidence consisted of testimony presented by the state during the later trial of petitioner's co-defendant, Clyde Daniel Wesley, claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. The Court rejected petitioner's seventh claim on the ground that, even assuming the trial court relied on petitioner's being the actual shooter in finding

that the aggravating circumstances outweighed the mitigating factors, the Supreme Court of Ohio effectively negated any possible error by including the testimony from Wesley's trial implicating Wesley as the actual shooter in their independent assessment of the mitigating factors, and still finding that the aggravating circumstances outweighed the mitigating factors sufficient to impose a death sentence. Petitioner argues that this Court erred by accepting as "binding" the Ohio Supreme Court's dismissive assessment of the testimony from Wesley's trial.

Petitioner has demonstrated no clear error of law or mistake of fact that would support Rule 59 relief as to his seventh claim for relief. By way of clarification, this Court did not hold that the State had committed error in arguing that petitioner was the actual shooter who killed Mrs. Stout or that the three-judge panel had committed error in relying on that factor in its sentencing decision. The Court only indicated that it was "troubled" by the possibility that the state might have secured petitioner's death sentence by arguing that he was the actual shooter, while later arguing during Wesley's trial that Wesley was the actual shooter. The Court went on to recognize that, even assuming the three-judge panel had relied on petitioner's being the actual shooter and, even assuming such reliance was erroneous or otherwise problematic, the Supreme Court of Ohio effectively cured any potential error or problem when it considered the testimony from Wesley's trial implicating Wesley as the actual shooter in conducting its own, independent assessment and weighing of the aggravating circumstances and mitigating factors. Petitioner argues that this was error; but, petitioner offers no authority supporting his argument. Thus, petitioner has failed to demonstrate a clear error of law justifying Rule 59 relief.

Petitioner likewise fails to demonstrate any mistake of fact that would warrant Rule 59 relief. That is, petitioner points out factors that this Court already considered but

disagrees with the decision this Court made. Petitioner takes issue with the minimal weight placed by the Supreme Court of Ohio on the testimony by Wesley's cellmate implicating Wesley as the actual shooter, in light of the fact that the state had thrown its weight behind that testimony, thereby lending more credibility than testimony by a jailhouse snitch would normally enjoy. The Court did not fail to consider this argument. Petitioner also expresses disbelief that his three-judge panel would have found a death sentence appropriate, if it had had the benefit of testimony implicating Wesley as the actual shooter -- testimony presented by the State. In making these arguments, petitioner presents no new facts and demonstrates no clear error of law. Petitioner merely disagrees with the decision this Court made. That sort of argument is better suited for appeal. *See Keweenaw Bay Indian Community, supra,* 152 F.R.D. at 563.

Conclusion

For the foregoing reasons, petitioner's motion pursuant to Rule 59(e) to alter or amend the judgment issued by this Court on February 7, 2001 is DENIED.

/s/GEORGE C. SMITH
United States District Judge

Date: May 1, 2001

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v.

Case No. C-1-96-668
JUDGE SMITH
Magistrate Judge Kemp

CARL ANDERSON, Warden,

Respondent.

OPINION AND ORDER

Final judgment dismissing petitioner's death penalty habeas corpus action was entered by this Court on February 7, 2001. A decision denying petitioner's motion to alter or amend that judgment was entered on May 1, 2001. This matter is before the Court on petitioner's notice of appeal, which this Court construes as a motion for a certificate of appealability,'[1] and motion to proceed *in forma pauperis.*

Petitioner raised nine claims for relief and many of those claims contained sub-parts. The Court issued an *Opinion and*

[1] Although this habeas corpus action was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), and was therefore governed by pre-AEDPA habeas corpus law, the appeal of this case is governed by the AEDPA's certificate of appealability requirements. *Slack v. McDaniel*, 529 U.S. 473, 476 (2000); *Mackey v. Dutton*, 217 F.3d 399, 406-407 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 804 (2001).

Order on November 9, 1999 finding that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. The Court's February 7, 2001 *Opinion and Order* denied the remainder of petitioner's claims on the merits.

I. Legal Standard for Certificate of Appealability

Petitioner seeks to appeal the denial of his habeas corpus petition and; to that end, filed a notice of appeal. This Court construes that notice as a motion for a certificate of appealability. Petitioner also seeks an order permitting him to proceed *in forma pauperis.* Requests for a certificate of appealability and requests to proceed *in forma pauperis* require a district court to make two separate determinations. *See Harkins v. Roberts, et al.*, 935 F.Supp. 871, 874 n.3 (S.D. Mississippi 1996). An appeal from the denial of a habeas corpus action may not proceed unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(l). To warrant a certificate of appealability, a petitioner must make a substantial showing that he was denied a constitutional right. 28 U.S.C. §2253(c)(2); *see also Barefoot v. Estelle*, 463 U.S. 880 (1983); *Lyons v. Ohio Adult Parole Authority, et al.*, 105 F.3d 1063 (6th Cir.), *cert. denied*, 520 U.S. 1224 (1997). He need not demonstrate that he will prevail on the merits; he needs only to demonstrate that the issues he seeks to appeal are deserving of further proceedings or are reasonably debatable among jurists of reason. *Barefoot*, 463 U.S. at 893 n.4. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484. The Court will turn first to those claims that were procedurally defaulted, to determine whether any of those default rulings warrant a certificate of appealability. The Court will then consider

whether *any* of the claims it denied on the merits satisfy the standard to be certified lot appeal.

II. Procedural Default Rulings

As noted above, the Court issued an *Opinion and Order* on November 9, 1999 finding that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. Those claims were:

1.2 It is improper to require proof of aggravating circumstances at the guilty phase of a capital trial;

1.4 The statutory scheme punishes those defendants who choose to go to trial;

1.6 The statute permits the pre-sentence investigation report to go to the sentencer with inadmissible information;

1.10 The statute does not permit the sentencer to use sympathy or mercy in determining punishment;

1.12 The statute does not permit the sentencer to choose life in prison over death when no mitigating factors have been proved;

1.14 The Ohio Court of Appeals is unable to compare similar cases where death sentences either are or are not imposed because no data on similar cases is maintained;

3. Stumpf's jury waiver was not knowing, voluntary, and intelligent.

5.a. The trial court erred in deciding Stumpf's motion for a new trial without him being personally

present and based on a record that was not correctly developed as to the involuntary nature of his guilty plea.

The Court concluded that six of these claims, *i.e.*, claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14, were record claims and were procedurally defaulted because they were not raised on direct appeal to either the Ohio Court of Appeals or the Supreme Court of Ohio. The Court further found that petitioner had not offered any cause sufficient to excuse the default. Because the default ruling did not turn on novel issues of law or intricate questions of fact that reasonable jurists would find debatable, the Court concludes that no certificate of appealability is warranted on its default ruling as to claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14.

The Court also concluded that petitioner's third claim for relief, *i.e.*, that his jury trial waiver was not knowing, intelligent, and voluntary, was barred by procedural default because petitioner had not properly presented it to the state courts. Specifically, the Court found that petitioner presented this allegation to the state courts only as an ineffective assistance of counsel claim, and never argued directly, either on direct appeal or during his postconviction proceedings, that his jury trial waiver was involuntary, unknowing, and unintelligent. The Court also found that petitioner failed to offer cause sufficient to excuse the default. The Court is not persuaded that reasonable jurists would regard as debatable the procedural default ruling as to claim three. Accordingly, no certificate of appealability is warranted.

Finally, the Court concluded that petitioner's second claim five, which this Court designated as claim 5.a., was procedurally defaulted. In that claim, petitioner asserted that it was error for the trial court to deny his motion for a new trial without his personal presence during the proceedings, and that his attorneys were ineffective for failing to develop

the record fully as to the involuntary nature of his guilty plea. The Court concluded that these allegations were procedurally defaulted because the only argument that petitioner raised on direct appeal regarding the denial of his motion for a new trial was that, on the merits, the motion should have been granted because the State of Ohio, after obtaining a death sentence in petitioner's case by asserting that petitioner was the principal offender, presented evidence in the co-defendant's trial that the co-defendant, rather than Petitioner Stumpf, was the principal offender; and that the trial court lacked jurisdiction to render its ruling on his motion for a new trial because the ruling was made by two judges instead of three, since one of the three original judges had died prior to the hearing. The assertions contained in claim 5.a were not properly presented to the state courts, either on direct appeal where they involved matters on the record, or during postconviction proceedings where they involved trial counsel ineffectiveness assertions. Those procedural defaults are straightforward and unquestionable. The Court is not persuaded, therefore, that its procedural default ruling as to claim 5.a. satisfies the standard to warrant a certificate of appealability.

The Court will turn now to the merits of those claims that were properly preserved for habeas corpus review.

III. Merits

A. Ground One -- Constitutionality of Ohio's Death Penalty

In his first claim for relief, petitioner raised nearly twenty arguments challenging the constitutionality of Ohio's death penalty scheme. As discussed in more detail above, the Court concluded that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14 were barred by procedural default. With respect to the remainder of petitioner's first claim, although some of petitioner's arguments admittedly are more substantial than others, the

Court is satisfied that petitioner's first claim for relief, is deserving of further proceedings under the standard for a certificate of appealability set forth in 28 U.S.C. §2253(c)(2) -- but only those allegations that were properly presented to the state courts and addressed by this Court on the merits.

1.1 Ohio's application of the death penalty is arbitrary and discriminatory;

1.3 The "felony murder" aggravating circumstance found in O.R.C. §2929.04(A)(7) is duplicative of the general definition of aggravated murder and does not serve to distinguish capital murders from other murders;

1.5 The statute permits the death penalty to be imposed upon one who neither possessed the specific desire to kill nor committed the murder with premeditation;

1.7 The statute does not require the State to prove the absence of mitigating circumstances;

1.8 The statute does not specify the method by which the aggravating factors and the mitigating factors are compared to each other;

1.9 The statute puts the burden on the defendant to prove mitigating factors by a preponderance of the evidence;

1.11 The proportionality review required by the statute cannot be accomplished because the State of Ohio does not maintain proper data concerning proportionality;

1.13 The sentencing judge or jury are not given any means by which to decide if death is the only appropriate penalty in the case;

1.15 The proportionality review conducted by the Ohio Appellate Courts is flawed because only cases in which a death sentence has been imposed are compared to each other;

1.16 The Appellate Courts' reweighing of the aggravating and mitigating circumstances is too cursory to be meaningful;

1.17 The death penalty is cruel and unusual punishment *per se*; and

1.18 Under the particular circumstances of Stumpf's case; the State has not demonstrated a compelling state interest in execution or that execution is the least restrictive means available to deter Stumpf from committing similar crimes.

The common thread running through petitioner's attacks on the constitutionality of Ohio's death penalty statute is the risk that Ohio's statutes, either as written or as applied, could result in the arbitrary or capricious infliction of the death penalty because of the failure of those statutes to genuinely, impartially narrow the class of offenders deserving of the death penalty. These issues are reasonably debatable among jurists of reason and, require heightened, perpetual scrutiny. Moreover, although the Sixth Circuit has addressed some of these arguments, it does not appear that the Sixth Circuit has squarely addressed every argument raised by petitioner. Accordingly, after careful consideration and being duly advised, the Court certifies for appeal the parts of petitioner's first claim enumerated above:

1. Do the statutory provisions governing Ohio's capital punishment scheme violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution on their face or as applied to petitioner?

B. Ground Two -- Stumpf's Plea was not Knowing, Voluntary, and Intelligent

Petitioner challenges the propriety of his guilty plea, essentially asserting that he derived no benefit from pleading guilty to capital murder, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand that he could still get the death sentence, and that his attorneys were ineffective for failing to advise him that he was not benefitting from the plea bargain and that he could still receive the death penalty. After careful consideration, the Court rejected petitioner's arguments because the record surrounding the acceptance of petitioner's plea was straightforward, reflected regularity, and revealed an acknowledgment and understanding by petitioner of the plea agreement, of the possibility that he could be sentenced to death by electrocution, and of his guilt -- albeit, qualified by a statement from his lawyers that he expected to be given an opportunity to present evidence relevant to his conduct. Petitioner's attorneys affirmed that they had investigated possible defenses, that they acquiesced in the plea agreement described by the prosecutor, and that they had discussed with petitioner the benefits and consequences of the the plea agreement. In any event, the Court is aware that, with the exception of a qualified admission on the record that he was actually guilty, petitioner has steadfastly maintained that it was his codefendant, and not petitioner himself, who fired the shots that killed the decedent. Further, the court is inclined to proceed with caution when faced with a defendant who pleads guilty to an indictment containing specifications that make him eligible for the death penalty. The Court is satisfied that reasonable jurists could debate whether petitioner's guilty

plea was knowing, intelligent, and voluntary. The Court accordingly certifies the following issue for appeal:

2. Was Petitioner Stumpf's guilty plea knowing, intelligent, and voluntary?

C. Ground Four -- Ineffective Assistance of Trial Counsel

Petitioner argued in his fourth claim for relief that his attorneys were constitutionally ineffective during the penalty phase of the case; he raised seven specific allegations:

4.1 Counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 Counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 Counsel did not spend enough time preparing for the mitigation hearing;

4.4 Counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 Counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them;

4.6 Counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 Counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

The importance of effective representation by counsel during the mitigation phase of a capital trial cannot be understated. *Terry Williams v. Taylor,* 529 U.S. 362 (2000); *see also Mapes v. Coyle,* 171 F.3d 408,426 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir.), *cert. denied,* 519 U.S. 910 (1996). That is especially true when, as in this case, the petitioner pleads guilty to death-eligible murder and has only the mitigation phase of his case standing between him and a death sentence. Although some of petitioner's counsel ineffectiveness allegations are more substantial than others, the majority of his allegations are legitimate accusations that have garnered substantial consideration by federal courts and have, in some cases, resulted in the reversal or setting aside of death sentences. The Court of Appeals for the Sixth Circuit, as well as numerous district courts within the sixth circuit, have paid particular attention to the adequacy of defense counsel performance during the penalty phase of a capital trial. *See, e.g., Scott v. Mitchell,* 209 F.3d 854, 879-881 (6th Cir.), *cert. denied,* 121 S.Ct. 588 (2000); *Austin v. Bell,* 126 F.3d 843,848-49 (6th Cir. 1997)(granting relief on claim of ineffective assistance of trial counsel during penalty phase), *cert. denied*, 523 U.S. 1079, *cert. denied*, 523 U.S. 1088 (1998); *Glenn v. Tate, supra*; *Mapes v. Coyle*, *supra*; *Jamison v. Collins*, 100 F.Supp.2d 647, 732 (S.D. Ohio 2000)(finding deficient performance by defense counsel, but no prejudice, during penalty phase); *Morales v. Coyle*, 98 F.Supp.2d 849, 894 (N.D. Ohio 2000)(granting relief on claim of ineffective assistance of counsel during penalty phase); *Mason* v. *Mitchell,* 95 F.Supp.2d 744, 785 (N.D. Ohio 2000). What is clear from these cases is that claims of counsel ineffectiveness

during the penalty phase of a capital trial require careful attention. Further, given the fact-intensive nature of those inquiries, such claims defy hard and fast rules that can be applied with ease in subsequent cases and instead, require case-by-case review. For these reasons, the Court is satisfied that petitioner's claims could be reasonably debated by jurists of reason sufficient to satisfy the standard set forth in §2253(c). Accordingly, the Court certifies for appeal petitioner's fourth claim for relief in its entirety:

3. Were Petitioner Stumpf's attorneys constitutionally ineffective during the penalty phase of his capital trial?

D. Ground Five -- Ineffective Assistance of Appellate Counsel

Petitioner argued in his fifth claim for relief that his appellate attorneys provided constitutionally ineffective assistance. Petitioner argued specifically that appellate counsel failed to assign as errors the trial court's failure to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements; the trial court's error in finding a sufficient factual basis for petitioner's guilty plea since there was insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout; the trial court's abuse of discretion in failing to grant petitioner's request for a change of venue; the trial court's abuse of discretion in accepting petitioner's guilty plea without explaining the nature of the charge as required by state rules of criminal procedure and constitutional law; the prosecution's improper comments regarding the unsworn nature of petitioner's statement in mitigation; and trial counsel's failure to develop a full record on the involuntary nature of petitioner's guilty plea. Petitioner also assailed appellate counsel for failing to ensure that the presentence investigation report was made a part of the record on appeal.

With two exceptions, the Court is persuaded that petitioner's fifth claim for relief satisfies the §2253(c) standard for a certificate of appealability. Initially, it bears reminding that petitioner entered a guilty plea and that, generally, a guilty plea results in waiver of the right to appeal non-jurisdictional defects. *See, e.g., Tollett v. Henderson,* 411 U.S. 258, 267 (1973); *Ross v. Court,* 30 Ohio St. 2d 323 (1972). In Ohio, however, a guilty plea to capital murder triggers a hearing to ensure that there is a factual basis for, the plea and does not preclude the defendant from attacking the sufficiency of the evidence on appeal. *See State v. Taylor,* 30 Ohio App. 2d 252,261 (Ohio App. 8 Dist. 1972). Two of the issues that appellate counsel unreasonably failed to raise, according to petitioner, were almost certainly waived due to his guilty plea, *i.e.*, the trial court's failure to issue findings of fact and conclusions of law in connection with petitioner's motion to suppress statements and the trial court's denial of petitioner's request to change venue. For that reason, the Court cannot find that reasonable jurists could find debatable appellate counsel's failure to assert those issues on direct appeal. The remainder of appellate counsel ineffectiveness issues asserted by petitioner in his fifth claim for relief warrant appeal wider §2253(c). Criminal defendants are entitled to effective assistance of counsel on the first appeal as of right, *Evitts v. Lucey,* 469 U.S. 387 (1985), and, although the narrowing of issues generally is regarded as the hallmark of effective appellate advocacy, *Smith v. Murray, 477* U.S. 527, 536 (1986); *Jones* v. *Barnes,* 463 U.S. 745, 754 (1983), at least one court within this district has remarked that the "winnowing" or "narrowing" of issues should be undertaken cautiously when the defendant's life is at stake. *Jamison v. Collins,* 100 F.Supp.2d at 740-41 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). In light of the seriousness with which the Sixth Circuit regards claims of appellate counsel ineffectiveness, *see Mapes v. Coyle*, *supra*, 171 F.3d at 427-29, the Court is satisfied that reasonable jurists could find

debatable petitioner's allegations of appellate counsel ineffectiveness. With the exception of the two issues that were waived by petitioner's guilty plea, *i.e.*, the trial court's failure to issue findings of fact and conclusions of law in connection with petitioner's motion to suppress statements and the trial court's denial of petitioner's request to change venue, the Court certifies petitioner's fifth claim for relief for appeal:

4. Did petitioner's appellate attorneys provide constitutionally ineffective assistance?

E. Ground Six -- Trial Court's Evaluation of Aggravating and Mitigating Factors

Petitioner argued in his sixth claim for relief that the trial court committed error by considering as aggravating factors matters which are not statutorily designated as aggravating factors and by not giving proper weight to the mitigation evidence that petitioner presented. The Court rejected petitioner's allegations, concluding that the non-statutory factors complained of were listed by the trial court, not as additional aggravating factors, but as reasons why the aggravating factor outweighed beyond a reasonable doubt the mitigating circumstances. The Court also pointed out that the integrity of the weighing process was bolstered by the fact that both the Ohio Court of Appeals and the Supreme Court of Ohio conducted their own independent weighing of the aggravating factor and mitigating circumstances and neither appears to have considered anything improper. It is clear that the trial court, appellate court, and Ohio Supreme Court each concluded that only one statutory aggravating factor existed, *i.e.*, that petitioner had killed Mrs. Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. Under the standard set forth in §2253(c), the Court cannot certify this issue for appeal. Although the process of balancing aggravating factor(s) against mitigating

circumstance(s) for purposes of determining whether to sentence a defendant to death is fact-intensive, petitioner's specific allegations simply are not debatable. Construing every possible doubt *in* petitioner's favor, reasonable jurists could not find either that the trial court or reviewing courts considered non-statutory aggravating factors, or that the trial court or reviewing courts failed or refused to give weight to mitigating circumstances.

F. Ground Seven -- Trial Court's Denial of Motion to Vacate Sentence or Withdraw Plea

Petitioner argued in his seventh claim for relief that the trial court committed error in denying his motion to vacate his sentence or withdraw his plea on the basis of newly discovered evidence. That newly discovered evidence was testimony presented by the State at the subsequent trial of petitioner's co-defendant, Clyde Daniel Wesley, that it was Wesley, not petitioner, who had shot and killed the decedent. The State had taken the exact opposite position during petitioner's case. In *Smith v. Groose*, 205 F.3d 1045 (8th Cir.), *cert. denied*, *Gammon v. Smith*, 121 S.Ct. 441 (2000), the Eighth Circuit held that the state violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain convictions of two different individuals for the same murders. The Court distinguished petitioner's case from *Smith v. Groose* because, unlike the evidence at issue in *Smith*, the inconsistent evidence at issue in petitioner's case, *i.e.*, whether petitioner or Wesley fired the fatal shots, concerned a fact that the State was not required to argue or prove in order to obtain a conviction for aggravated murder or a sentence of death in either trial; but that certainly could be debated among reasonable jurists. The Court also resolved its concern that the State might have secured petitioner's death sentence by presenting inconsistent evidence by taking note that the Supreme Court of Ohio, it its decision affirming the judgment

against petitioner, rejected the evidence claiming that it was Wesley, not petitioner, who had shot and killed the decedent. That conclusion, too, could be debated among reasonable jurists. The Court accordingly certifies the following issue for appeal:

5. Did the trial court err in denying petitioner's motion to vacate his sentence or withdraw his plea based on newly discovered evidence?

G. Ground Eight -- Trial Court's Denial of Motion with Two Instead of Three Judges

In his eighth claim for relief, petitioner argued that his constitutional rights were violated when his motion to vacate his sentence was denied by only two judges following the intervening death of one of the judges who had comprised petitioner's three-judge panel. Petitioner reasoned that, because O.R.C. §2945.06 requires the bench trial of a capital defendant to be conducted by a three judge panel, "[c]onsideration of post-sentencing proceedings by less than the entire panel is not authorized and violates petitioner's right to due process***." (Petition, doc. no. 2, at ¶80). The Court concluded that petitioner's claim scarcely demonstrated even a state law violation and fell far short of demonstrating arbitrary and capricious imposition of the death penalty. Construing every possible doubt in petitioner's favor, the Court is not persuaded that reasonable jurists could find its decision debatable or wrong.

H. Ground Nine -- Failure of Sentencing Opinion to Comply with State Law

Petitioner argued in his ninth claim for relief that the trial court did not comply with O.R.C. §2929.03(F), which provides that when a three-judge panel imposes a death sentence, the panel must state in a separate opinion specific

findings relating to the existence of any mitigating factors, aggravating circumstances, and the reasons why the aggravating circumstances outweighed the mitigating factors. Petitioner complained that the trial court did not identify adequately the aggravating and mitigating factors or assign them proper weight. The Court concluded that the trial court's sentencing opinion complied with the letter and spirit of R.C. §2929.03(F) by setting forth explicitly the mitigating factors, the aggravating circumstance, and the reasons why the aggravating circumstance outweighed beyond a reasonable doubt the mitigating factors. In other words, the Court found that petitioner failed entirely to demonstrate how the trial court's sentencing opinion deviated at all *from* R.C. §2929.03(F). The Court does not believe that reasonable jurists could find the Court's decision debatable or wrong.

In sum, the Court certifies the foregoing five issues for appeal under the standard set forth in 28 U.S.C. §2253(c)(2).

IV. *In Forma Pauperis*

The inquiry as to whether a petitioner can proceed *in forma pauperis*, however, is not resolved by a determination that the petitioner has satisfied the requirements for a certificate of appealability under 28 U.S.C. §2253(c)(2). Section 1915, Title 28 United States Code governs a district court's *in forma pauperis* determination. The grant of pauper status for purposes of appealing the denial of §2254 relief requires a court to determine both that the applicant is unable to pay the required filing fee and that the appeal is taken in good faith. Thus, when a prisoner seeks to proceed *in forma pauperis* on appeal from the denial of §2254 relief, the district court must determine, in addition to whether the prisoner is able to pay the filing fee, whether the appeal is taken in good faith. As a general rule, an appeal is not taken in good faith if the issue presented is frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Although this determination will

require an inquiry into the merits of the appeal, it does not require that probable success be demonstrated. Rather, the court's inquiry should be limited to whether the appeal involves "legal points arguable on their merits." *Darden v. McMackin*, 761 F.Supp. 52, 54 (N.D. Ohio W.D. 1991)(citing *Jones v. Frank*, 622 F.Supp. 1119 (W.D. Texas 1985)). The Court is satisfied that petitioner has made both the inability to pay and good faith showings required to proceed *in forma pauperis* on direct appeal under §1915(a), and he may therefore proceed *in forma pauperis* on appeal.

IT IS SO ORDERED.

/s/George C. Smith
United States District Judge

Date: 7/11/01

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John David Stumpf,	:	
Plaintiff,	:	
v.	:	Case No. C-1-96-668
Carl Anderson, Warden,	:	JUDGE SMITH
Defendant.	:	

OPINION AND ORDER

This is a death penalty habeas corpus case filed by petitioner, John David Stumpf, pursuant to 28 U.S.C. §2254. After pleading guilty to capital murder, and after an evidentiary hearing to determine the factual basis for the plea and a mitigation hearing to address sentencing issues, Stumpf was sentenced to death by a three-judge panel on September 24, 1984. After exhausting all available state court remedies, Stumpf filed this habeas corpus petition in the United States District Court for the Northern District of Ohio on November 16, 1995. The case was eventually transferred to this Court and docketed in the Southern District of Ohio on July 5, 1996. A stay of execution has been issued. This order will address the question of whether any of Stumpf's claims for relief must be denied on grounds that they were procedurally defaulted during the course of state court proceedings, and that he has not successfully demonstrated the existence of cause sufficient to excuse that default.

I.

The details of the murder to which Stumpf confessed are set forth in numerous state court opinions, including the Ohio Supreme Court's published opinion in *State v. Stumpf*, 32 Ohio St. 3d 95, 512 N.E.2d 598 (1987) This Opinion and Order will include only a brief summary of those facts, because, for the most part, they are undisputed and do not play a significant part in the federal constitutional issues raised in Stumpf's habeas corpus petition.

On May 14, 1984, Stumpf, Clyde Daniel Wesley, and Norman Leroy Edmonds, after visiting a bar in Washington, Pennsylvania, got on Interstate 70 and headed west toward Ohio. By sundown, they had reached Guernsey County. They stopped their car along I-70 and, leaving Edmonds in the car, Stumpf and Wesley walked to a nearby house under the pretense of needing to make a phone call.

The house they chose was owned and occupied by Norman and Mary Jane Stout. Mr. Stout admitted Stumpf and Wesley into his home and allowed them to use the phone. When they had completed the call, both Stumpf and Wesley produced pistols and announced a robbery. Stumpf held the Stouts at gunpoint in a back bedroom while Wesley searched the house for items to steal.

At some point, Mr. Stout moved toward Stumpf, and Stumpf shot him between the eyes with his pistol. The shot was not fatal, and Stout subsequently pushed Stumpf into the next room. During this altercation, Stout was struck on the head with a pistol and shot in the head a second time. These actions were enough to render him semi-conscious but not to kill him.

While lying on the floor in the other room, Stout heard four gunshots. There is no dispute that Mary Jane Stout was

shot and killed during the course of this robbery, although there is a dispute as to whether Stumpf or Wesley fired the fatal shots. After Mrs. Stout was killed, Stumpf and Wesley stole the Stout's car and fled. Stumpf was arrested several days later, and after initially denying any knowledge about these crimes and then being told that Mr. Stout had survived, he confessed to being involved.

At the time the trial court proceedings occurred, Wesley had not yet been extradited from Texas. However, subsequent to Stumpf's having pleaded guilty and having been sentenced to death, Wesley was convicted of aggravated murder by a jury and received a sentence of life imprisonment without the possibility of parole for 20 years. The State introduced evidence at Wesley's trial that Wesley and not Stumpf fired the shots that killed Mrs. Stout. Edmonds was not charged in the Stout murder and robbery, but was charged for other offenses committed during this crime spree, and he agreed to and did testify against both Stumpf and Wesley concerning the murder of Mary Jane Stout.

II.

This case has followed the typical procedural path through the state court system. After being sentenced to death, Stumpf filed a direct appeal which was pursued through the Fifth District Court of Appeals and to the Ohio Supreme Court, and he also filed a post-conviction petition which, after it was denied, was appealed to both those courts. He did not file a petition for delayed reconsideration in the Court of Appeals, as authorized by *State v. Murnahan*, 63 Ohio St. 3d 60 (1992), because he raised ineffective assistance of appellate counsel claims in his post-conviction petition and, although the trial court declined to consider those claims, the Court of Appeals addressed them on their merits during the course of the appeal from the denial of the post-conviction petition. All of Stumpf's state court appeals were exhausted,

and his last petition for a writ of *certiorari* to the United States Supreme Court was denied, by November 12, 1991. It is unclear why more than four years elapsed before he filed his federal habeas corpus petition. It is helpful, in this opinion, to set forth in some detail the procedural history of this case. This history will be useful not only for analyzing the procedural default issues addressed here, but also in providing a broader context for the analysis on the merits of his claims which will be addressed in a subsequent opinion.

A. Trial and Direct Appeal

Stumpf was indicted by the May, 1984 term of the Guernsey County Grand Jury for the crimes which he allegedly committed on May 14, 1984. The indictment charged him with aggravated murder with certain specifications under O.R.C. §§2929.04 and 2929.71; attempted murder; aggravated robbery; and two counts of theft. The transcripts filed by the parties reflect that trial proceedings began on August 20, 1984 with arguments on pretrial motions, although it appears that a hearing on a motion to suppress, which raised a *Miranda* warning issue, was held on July 31, 1994. After additional testimony on the motion to suppress was heard, the trial court overruled it, and jury selection began. Jury selection continued through August 21 and 22, 1984, and ended on August 23, 1984 when Stumpf waived a jury trial.

The record does not reflect that any colloquy was held in open court concerning the jury waiver. Although the waiver occurred on August 23, 1984, the transcript of proceedings filed with this Court ends in the middle of *voir dire* questioning of a juror. The next volume of the transcript begins on September 17, 1984, before a three-judge panel, and at the beginning of those proceedings Judge Henderson, the presiding Judge, made the following statement:

"By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a three-judge panel in the Court to which the case may be pending. I fully understand that under the laws of this State, I have a Constitutional right to a trial by jury."

(Tr., 9/17/84, at 4-5).

Immediately after reading that statement into the record, the Court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as set forth in the record, are essentially the following.

The two most serious counts of the indictment returned against Stumpf were Counts One and Two. Count One, the capital murder count, accused Stumpf of killing Mary Jane Stout during the commission or the attempted commission of a felony. There were four specifications to that count. The first specification alleged that Stumpf committed the murder for purposes of escaping detection, apprehension, trial or punishment for the aggravated robbery offense. The second specification charged that the killing was a part of course of conduct involving an attempt to kill two or more persons, namely Mary Jane Stout and Norman Stout. The third specification repeated the "felony murder" language of Count One, accusing Stumpf of committing the murder in the course of committing an aggravated robbery. It also asserted that Stumpf was the principal offender for the aggravated murder count. Finally, the fourth specification was a firearms specification. Count Two, the attempted murder count involving Norman Stout, also had a firearms specification.

As recited by the prosecutor, the plea agreement would permit the prosecutor to amend the first specification to Count One by alleging that Mary Jane Stout was killed by Stumpf for the purposes of escaping detection, apprehension, trial or punishment not just for one, but for two other offenses which he committed, both aggravated robbery as specified in the indictment and also the attempted aggravated murder of Norman Stout. The second and third specifications to Count One would be dismissed, and Stumpf would plead guilty to Count One with the first and fourth specifications only. As amended, and even with the second and third specifications dismissed, Count One was still a capital murder count which carried the potential for the death penalty. Stumpf also agreed to plead guilty to Count Two, attempted aggravated murder, with the understanding that the firearms specifications on Count One and Two would be merged for sentencing purposes. The remaining counts of the indictment would be dismissed.

After these terms were recited on the record, Stumpf was asked, and he acknowledged, that these were the terms of the plea agreement. (Tr., 9/17/84, at 8-9). The Court then entered into a colloquy both with counsel and with Stumpf concerning the rights which would be waived if he pleaded guilty. Of most significance, Stumpf was asked the following questions and gave the following answers:

> "JUDGE HENDERSON: For the first Count, which is that of aggravated murder, you are subject to the following penalties: you are subject to being - - to a sentence of 20 years without probation that is a sentence of life without probation for 20 years; a sentence of life without probation for a period of 30 years and the death penalty by electrocution could be imposed against you. Do you understand
>
> THE DEFENDANT: Yes, sir."

(Tr. 14). He was asked again, at Tr. 17-18, if he understood that after hearing the evidence relating to the factual basis for a plea and the evidence in mitigation, he could receive "the maximum sentence prescribed by law," and he acknowledged that he understood that. He then denied that any other agreements, promises, or inducements were made to obtain a guilty plea. (Tr. 18).

Judge Henderson then asked Stumpf if he was "in fact guilty of Count One with specification one and specification four?" (Tr. 18). Stumpf did not directly answer that question. Rather, his counsel responded with a statement that he had been asked by Stumpf to explain the answer, that the answer was yes, and that Stumpf would say so conditioned upon his right to present evidence at a later time concerning the nature of his conduct. (Tr. 18). The Judge responded by stating that Stumpf would have the right to present evidence in the mitigation hearing, but he then asked Stumpf again, with that understanding, to respond to the question of whether he was in fact guilty of aggravated murder including the two specifications. Stumpf responded that he was. (Tr. 18-19). He then pleaded guilty to that count. (Tr. 22).

Under applicable law, in a capital murder case, the trial court, even when a guilty plea has been presented, is required to hear evidence to insure itself that the defendant is actually guilty of the offense to which he pleaded. That evidentiary hearing began on September 18, 1984 and lasted for three days.

Various witnesses were called to testify at the evidentiary hearing. The only eyewitness account of what occurred inside the Stout home was provided by Norman Stout. At the time of the hearing, he was still suffering from the after-effects of having been shot twice in the head. Neither Mr. Stout nor any other witness was able to state conclusively

whether Stumpf or Wesley shot Mary Jane Stout. In his opening statement, Stumpf's counsel asserted that Wesley was the shooter, notwithstanding the fact that his client had pleaded guilty to a capital murder charge involving Mary Jane Stout.

Various statements made by Stumpf to law enforcement officers were introduced at the trial. In those statements, he denied shooting Mary Jane Stout, although he admitted shooting Norman Stout with one of the two .25 caliber revolvers which were used in the crime. The closest which the evidence came to identifying the shooter was the testimony of a ballistics expert who opined that all the bullets removed from Mary Jane Stout and the bullet removed from Norman Stout's head had been fired from the same gun. Since Stumpf admitted that he shot Norman Stout, an inference could have been drawn that he also shot Mary Jane Stout.

At the close of the evidence, Stumpf's counsel argued that the state had not presented sufficient evidence to demonstrate factual support for the finding that Stumpf was guilty of specification one, mainly committing the murder in order to avoid apprehension for other offenses. That motion was overruled and the Court found Stumpf guilty of all the offenses to which he had entered a guilty plea. That finding was made on September 20, 1984, and the mitigation hearing began immediately. After the pre-sentence investigation report was introduced at the request of Stumpf's counsel, a number of witnesses testified concerning mitigating factors. The hearing was completed on September 21, 1984. On that date, Stumpf's mother testified, and Stumpf himself gave an unsworn statement. His unsworn statement did not directly address mitigating factors, but rather consisted of his version of the crime, which included a denial that he shot Mary Jane Stout. The State presented one witness at the mitigation hearing, the Guernsey County Probation Officer, who testified concerning Stumpf's criminal history.

On September 24, 1984, the case was reconvened for purposes of sentencing. At the sentencing hearing Stumpf received a 7 to 25 year term on Count Two plus a three-year mandatory consecutive term for the firearms specification. On Count One, Stumpf was sentenced to death based upon the court's finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. After a written judgment entry to that effect was filed, Stumpf began the appellate process.

B.

Represented by the same counsel, Stumpf filed his notice of appeal on October 23, 1984. He raised the following assignments of error:

ASSIGNMENT OF ERROR NO. 1
THE TRIAL COURT ERRED IN FINDING THAT THE ONE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENDANT. THE PROCEDURE FOLLOWED BY THE COURT WAS CONTRARY TO LAW. THE FINDING WAS CONTRARY TO THE EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2
THE DEATH SENTENCE IS DISPROPORTIONATE TO THAT IMPOSED IN SIMILAR CASES, AND THEREFORE VIOLATIVE OF THE STATE AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3
THE TRIAL COURT ERRED IN REQUIRING EVIDENCE OFFERED IN MITIGATION TO BE PROVED BY A PREPONDERANCE. SUCH A REQUIREMENT DEPRIVED THE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW. THE TRIAL COURT ERRED IN ITS JUDGMENT AND SENTENCE BY FAILING TO COMPLY WITH SECTION 2929.03 (F) OF THE OHIO REVISED CODE.

ASSIGNMENT OF ERROR NO. 5
UPON AN INDEPENDENT WEIGHING, IT IS APPARENT THAT THE SINGLE AGGRAVATING CIRCUMSTANCE THE DEFENDANT WAS FOUND GUILTY OF COMMITTING DOES NOT OUTWEIGH THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT, AND THEREFORE, THE DEATH SENTENCE CANNOT BE AFFIRMED, PURSUANT TO REVISED CODE SECTION 2929.05(A).

ASSIGNMENT OF ERROR NO. 6
DEATH IS NOT THE APPROPRIATE SENTENCE IN THIS CASE. THEREFORE, PURSUANT TO REVISED CODE SECTION 2929.05(A), AND REVISED CODE SECTION 2929.06, AND THE STATE AND FEDERAL CONSTITUTIONS, THIS DEATH SENTENCE MUST BE VACATED AND

THE CASE REMANDED FOR A RE-SENTENCING HEARING TO DETERMINE WHICH LIFE TERM WILL BE IMPOSED.

ASSIGNMENT OF ERROR NO. 7
THE DEATH PENALTY IMPOSED UPON THE DEFENDANT, AND THE STATUTES AUTHORIZING IT, IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS TWO, NINE, TEN AND SIXTEEN, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 8
OHIO REVISED CODE, SECTIONS 2929.03 AND 2929.04, AS APPLIED TO THE DEFENDANT, VIOLATE UNITED STATES CONSTITUTION, AMENDMENT VIII AND OHIO CONSTITUTION ARTICLE I, SECTION 9, PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

ASSIGNMENT OF ERROR NO. 9
THE DEATH PENALTY IMPOSED UPON THIS DEFENDANT UNDER SECTIONS 2929.02, 2929.022, 2929.03 AND 2929.04 OF THE REVISED CODE OF OHIO VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTION 2929.04(A) IS OVERBROAD AND VAGUE.

ASSIGNMENT OF ERROR NO. 10
THE MITIGATING CIRCUMSTANCES IN SECTION 2929.04(3) OF THE REVISED CODE OF OHIO ARE IMPERMISSIBLY VAGUE.

While the direct appeal was pending, Stumpf filed a motion for leave to withdraw his guilty plea. On September 26, 1985, the Court of Appeals remanded the case in order to allow the trial court to consider that motion. In his motion, Stumpf argued that because Clyde Daniel Wesley had, subsequent to Stumpf's guilty plea and sentencing hearings, been found guilty of aggravated murder, and because the State had presented a witness in Wesley's trial who testified that Wesley confessed to having shot Mary Jane Stout, Stumpf should be permitted either to withdraw his guilty plea to that charge or be entitled to reopen the mitigation hearing in order to offer evidence that he was not the principal offender in the crime. On October 7, 1985, the trial court overruled that motion, and Stumpf subsequently filed a timely notice of appeal and raised an additional assignment of error asserting that the trial court erred in denying his motion to set aside his plea or in the alternative to conduct a new sentencing hearing. The Court of Appeals, in a decision filed on May 22, 1986, overruled both the original and supplemental assignments of error and affirmed Stumpf's conviction. One judge of the three-judge panel dissented in part, concluding that the obligation imposed by law to weigh the death sentence imposed on Stumpf against sentences imposed in similar cases required that Stumpf be sentenced no more harshly than Wesley.

Stumpf, still represented by the same counsel who had represented him at trial, appealed the judgment of the Court of Appeals to the Ohio Supreme Court. The assignments of error raised in that court were substantially the same as those presented to the Court of Appeals. In the published opinion referred to earlier, the Ohio Supreme Court also affirmed the

conviction and sentence, and Stumpf's petition for a writ of *certiorari* to the United States Supreme Court was denied on February 22, 1988.

Stumpf filed a post-conviction petition in the Guernsey County Court of Common Pleas on October 11, 1988. He amended his petition on November 18, 1988. In his petition, he raised four separate grounds, as follows:

1. The petitioner was denied the effective assistance of counsel in the guilt determination and mitigation phases of his case as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I §10 and 16 of the Ohio Constitution.

    a. Counsel's ineffective assistance violated the Sixth Amendment and rendered the guilty plea involuntary.

    b. Counsel failed to properly prepare the penalty phase of the trial.

2. The petitioner did not knowingly, intelligently and voluntarily waive his right to a jury trial.

3. Counsel neglected to properly prepare and present the petitioner's motion for a new trial.

4. Counsel denied the petitioner effective assistance of counsel on appeal as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I Sections 10 and 16 of the Ohio Constitution; and *Evitts v. Lucey* (1985), 469 U.S. 387.

Both parties moved for summary judgment in the post-conviction action, and on November 27, 1989, the trial court

overruled the petition, adopting almost verbatim the proposed findings of fact and conclusions of law submitted by the county prosecutor. Stumpf timely appealed the denial of his postconviction petition, and that denial was affirmed by the Fifth District Court of Appeals on July 23, 1990. That decision was subsequently affirmed by the Ohio Supreme Court and a petition for *certiorari* to the United States Supreme Court was denied on November 12, 1991.

C. The Habeas Corpus Petition

Stumpf's habeas corpus petition raises ten separate claims for relief. Two of them are designated as the "fifth claim," explaining why a petition raising ten claims ends with the ninth claim for relief. Many of the claims have subparts. This section of the Opinion and Order will set forth in detail the claims Stumpf has raised in this court.

1. Claim One - Unconstitutionality of the Death Penalty

Stumpf's petition mounts a general attack on the constitutionality of Ohio's death penalty scheme, both on its face and as applied to the particular facts of its case. There appear to be 18 separate claims, and it is important to identify each separately, because a fair number of them appear not to have been raised as part of the state court proceedings. The Court will reproduce the claims in the order which they appear in the habeas corpus petition.

Stumpf's constitutional claims are the following:

1.1 Ohio's application of the death penalty is arbitrary and discriminatory;

1.2 It is improper to require proof of aggravating circumstances at the guilt phase of a capital trial;

1.3 The "felony murder" aggravating circumstance found in O.R.C. §2929.04(A) (7) is duplicative of the general definition of aggravated murder and does not serve to distinguish capital murders from other murders;

1.4 The statutory scheme penalizes those defendants who choose to go to trial;

1.5 The statute permits the death penalty to be imposed upon one who neither possessed the specific desire to kill nor committed murder with premeditation;

1.6 The statute permits the pre-sentence investigation report to go to the sentencer with inadmissible information;

1.7 The statute does not require the State to prove the absence of mitigating circumstances;

1.8 The statute does not specify the method by which the aggravating factors and the mitigating factors are compared to each other;

1.9 The statute puts the burden on the defendant to prove mitigating factors by a preponderance of the evidence;

1.10 The statute does not permit the sentencer to use sympathy or mercy in determining punishment;

1.11 The proportionality review required by the statute cannot be accomplished because the State of Ohio does not maintain proper data concerning proportionality;

1.12 The statute does not permit the sentencer to choose life in prison over death when no mitigating factors have been proved;

1.13 The sentencing judge or jury are not given any means by which to decide if death is the only appropriate penalty in the case;

1.14 The Ohio Court of Appeals is unable to compare similar cases where death sentences either are or are not imposed because no data on similar cases is maintained;

1.15 The proportionality review conducted by the Ohio Appellate Courts is flawed because only cases in which a death sentence has been imposed are compared to each other;

1.16 The Appellate Courts' reweighing of the aggravating and mitigating circumstances is too cursory to be meaningful;

1.17 The death penalty is cruel and unusual punishment per se; and

1.18 Under the particular circumstances of Stumpf's case, the State has not demonstrated a compelling state interest in execution or that execution is the least restrictive means available to deter Stumpf from committing similar crimes.

2. Claim Two - Stumpf's Guilty Plea was not Knowing, Voluntary and Intelligent

Stumpf's second claim attacks the propriety of his guilty plea. Essentially, he asserts that he derived no benefit from pleading guilty to a capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand, when he pleaded guilty, that he could still get the death sentence, and that his counsel was ineffective at this stage for failing to advise him that he was not benefiting

from the plea bargain and that he could still receive the death penalty.

3. Claim Three - Stumpf's Jury Waiver was not Knowing, Voluntary and Intelligent

In his third claim, Stumpf attacks the propriety of his waiver of the right to trial by jury. He claims both that the state court did not make an appropriate inquiry to determine whether he fully understood the right he was waiving, and that his counsel rendered him ineffective assistance at this stage of the case. With respect to this latter portion of the claim, he contends that the decision to waive the jury was motivated by the killing of a police officer in the Guernsey County area during jury selection in his case. He asserts that, rather than deciding that this factor would make it next to impossible to select a fair jury, counsel should have renewed an earlier motion trial.

4. Claim Four - Ineffective Assistance of Trial Counsel

Stumpf claims that his attorneys were constitutionally ineffective at the penalty phase of the case. There are seven subparts to this claim:

4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the Court from giving substantial weight to them;

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

5. Ineffective Assistance of Appellate Counsel

In the first of the two claims in the petition designated as the "fifth claim," Stumpf asserts that his appellate counsel was also ineffective. This claim has six subparts:

5.1 That counsel did not raise as an issue on appeal the trial court's failure to file findings of fact and conclusions of law relating to his motion to suppress his statements;

5.2 That counsel erred in failing to raise the absence of a factual basis for Stumpf's guilty plea;

5.3 That counsel should have moved for a change of venue;

5.4 That counsel should have attacked the Court's acceptance of the guilty plea without explaining precisely to Stumpf the nature of the charge to which he was pleading guilty;

5.5 That counsel failed to raise the prosecutor's improper comments directed toward Stumpf's unsworn statement; and

5.6 That counsel failed to insure that the presentence investigation report was included in the appellate record.

5a. Claim Five(second) - The *New* Trial Hearing

In the second "fifth claim" in his petition, Stumpf asserts that it was error to decide his motion for a new trial without him being personally present. He also asserts that the record was not correctly developed as to the involuntary nature of his guilty plea. This latter contention appears to be another claim of ineffective assistance of counsel at the trial court level.

6. Claim Six - Trial Court Errors

In his sixth claim, Stumpf asserts that the trial court lost its way when it evaluated the aggravating and mitigating circumstances in his case. Essentially, he asserts that the court considered as aggravating factors matters which are not so designated by Ohio law, and that the court also failed to give appropriate weight to the mitigating evidence which he presented.

7. Claim Seven - Denial of Motion to Vacate Sentence/ Withdraw Guilty Plea

In his seventh claim, Stumpf asserts that the trial court improperly denied his motion to vacate his sentence or, in the

alternative, to withdraw his guilty plea based on new evidence. This relates to the motion filed by Stumpf after the State successfully prosecuted Clyde Daniel Wesley for aggravated murder using evidence that he, and not Stumpf, fired the four shots which killed Mary Jane Stout. Stumpf asserts that, at a minimum, the presentation of this evidence, which was not available to him at the time of his trial, required the Court to vacate the death sentence and consider a lesser penalty.

8. Claim Eight - The Post-Sentencing Hearing

Stumpf was sentenced by a three-judge panel, as required by Ohio law. His post-sentence motion was determined by only two judges, because the third judge from the original panel had died in the interim. He asserts that in his eighth claim that this procedure violated Ohio law because all proceedings in a capital murder case are required to be conducted by a three-judge panel.

9. Claim Nine - Noncompliance with O.R.C. 2929.03(F)

Finally, in his ninth claim, Stumpf asserts that the trial court did not comply with Ohio Revised Code §2929.03(F). That statutory section provides that when a three-judge panel imposes a sentence of death, it is required to state in a separate opinion specific findings relating to the existence of any mitigating factors set forth by statute, any other mitigating factors, the aggravating circumstances in the case, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. Stumpf

contends that the trial court did not adequately identify aggravating and mitigating factors nor did its opinion assign them the appropriate weight.

III. PROCEDURAL DEFAULT

It does not appear that every claim Stumpf has raised in his habeas corpus petition was presented to the Ohio courts either during the direct appeal or as part of the post-conviction process. In particular, respondent contends that at least seven of the eighteen issues presented under Claim One were the subject of a procedural default, and that Claim Three and the second "fifth claim" were also waived in this manner. This claim of procedural default is evaluated under the following legal standard.

A.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the state courts for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present his claims, then his petition is subject to dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of a procedural default, the petitioner can no longer present his claims to the state courts, then he has also waived those claims for purposes of federal habeas corpus review, unless he can demonstrate both cause for the procedural default, as well as actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is waived by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) "First, the court must decide that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with, and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule, and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), cert. *denied*, 474 U.S. 831 (1985).

B.

Respondent claims that at least seven of the grounds presented in petitioner's first claim in support of the argument that the Ohio Death Penalty statute is unconstitutional were never presented to any Ohio court. Because each of these claims would be apparent from the face of the record, petitioner was required to present them in his direct appeal. The Court has carefully reviewed the record of the direct appeal, both to the Court of Appeals of Guernsey County and the Ohio Supreme Court, and concludes that at least six of those claims were never presented in such a way that the Ohio courts could fairly rule upon them.

In the claims which this Court has designated as Claims 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14, petitioner argues that Ohio's death penalty scheme is unconstitutional because it requires proof of aggravating circumstances during the guilt phase of the capital case; penalizes defendants who choose to go to trial; permits a presentence investigation report with improper information to go to the sentencer; precludes the sentencer from using sympathy or mercy to choose a lesser sentence than death; precludes the sentencer from choosing a life sentence in the absence of any mitigating factors; and, as applied, does not allow the Court of Appeals to conduct an adequate proportionality review because there is a lack of data concerning other similar cases which can be used in that review. The Court has found no argument presented by petitioner either in the Court of Appeals or the Ohio Supreme Court which raises any of these issues. Thus, they have been procedurally defaulted. Because petitioner has not offered any cause for the procedural default, these claims are waived for purposes of federal habeas corpus review.

Respondent also contends that another of petitioner's constitutional claims, which this Court has designated as Claim 1.17 and which asserts that the death penalty is cruel and unusual punishment per se, has been waived because it was not fairly presented to the Ohio courts. In his seventh and eighth assignments of error in the Court of Appeals, which were repeated as Propositions of Law 7 and 8 in his appeal to the Ohio Supreme Court, petitioner argued that the death penalty is unconstitutional under, *inter alia*, the Eighth Amendment to the United States Constitution. Although his supporting, argument did not directly assert that the death penalty is 'unconstitutional in all circumstances, in arguing these two propositions, especially Proposition of Law 7, petitioner contended that the death penalty is unconstitutional because the incapacitation of the offender could be achieved by a life sentence without chance of parole for either 20 or 30 years, that retribution is an improper justification for the death

penalty, and that there is no evidence that it serves as a deterrent. Under those circumstances, petitioner argued that the death penalty could not legitimately be imposed. In the Court's view, this is sufficiently close to asserting that the death penalty is unconstitutional per se to preclude a finding that this argument has been waived.

Next, respondent asserts that Claim Three, in which petitioner asserts that his waiver of the right to a jury trial was not knowing, voluntary, and intelligent, was waived because it was never properly presented to the state courts. Respondent concedes that an issue relating to the validity of the jury waiver was raised in petitioner's post-conviction petition, but contends that because the issue was treated differently on appeal, it was not fairly presented either to the Court of Appeals or to the Ohio Supreme Court. In order to address this argument, it is necessary to review in some detail both the post-conviction petition and the issues raised on appeal from the denial of that petition.

In the post-conviction petition, which was filed on October 11, 1988, petitioner raised four claims for relief. In his first claim, he asserted that he was denied the effective assistance of counsel during the guilt determination of his case (i.e., the guilty plea colloquy), and that this ineffective assistance rendered his guilty plea involuntary. As a sub-part of that claim, he contended that counsel's advice to him to waive a jury, premised upon the fact that a police officer had recently been shot and killed in Guernsey County during jury selection and that it would be hard to get a fair trial with a Guernsey County jury under those circumstances, was improper advice, and that counsel should have renewed a motion for a change of venue instead of recommending a jury waiver. (Post-conviction Petition, Exhibit KK, at 8-9). That claim is restated in the amended post-conviction petition which was filed on November 18, 1988. In its decision, the trial court concluded that the decision to waive a jury was a

reasonable trial tactic. (Decision of November 27, 1989, Exhibit PP, ¶18).

On appeal, petitioner raised six assignments of error. The first assignment asserted that the waiver of a jury trial was invalid because of the ineffective assistance of trial counsel. (See Appellant's Brief and Assignments of Error filed February 26, 1990, Exhibit RR). In its opinion issued on July 23, 1990, the Court of Appeals concurred with the trial court's judgment that this was a "plausible and reasonable strategic decision" and affirmed on this issue. (Exhibit TT, at 5). The issue was presented to the Ohio Supreme Court in the same way. (See Appellant's Memorandum in Support of Jurisdiction filed September 20, 1990, Exhibit VV, at 5).

In his habeas corpus petition filed in this Court, petitioner asserts not that trial counsel was ineffective for inducing him to waive a jury trial, but that the waiver itself was not knowing, voluntary, and intelligent. He contends that the trial court did not hold an adequate hearing to determine whether he was voluntarily, knowingly, and intelligently waiving his right to a jury trial, and that this Court can, as a result of that failure, set aside the waiver.

The failure of the trial court to hold an adequate hearing with respect to the jury trial waiver is an issue that should have been raised on direct appeal, because it is something that would appear on the face of the record. However, a review of the direct appeal does not reveal that this claim was ever raised. Further, to the extent that the involuntariness of the jury waiver itself depended upon matters outside the record, such as advice given by counsel to petitioner outside of the presence of the court, such a claim could have been raised in the post-conviction petition: Rather than raising it directly, petitioner chose to present it as a claim of ineffective assistance of counsel. Although the ineffective assistance of counsel claim and the involuntary nature of the jury trial

waiver based upon improper advice of counsel may depend upon the same set of facts, they are conceptually distinct. A different constitutional analysis is required for each. Because petitioner chose to present this issue to the state court only as an ineffective assistance of trial counsel claim, and because he never raised directly, either during the course of his direct appeals or during the course of the post-conviction proceedings, the claim that his jury trial waiver was involuntary, unknowing, and unintelligent, that claim is also procedurally defaulted. Again, since petitioner has made no argument that cause excused his failure to raise this claim, it is waived for purposes of federal habeas corpus review.

Finally, respondent contends that the second part of the fifth claim, in which petitioner asserts that it was error for the trial court to deny his motion for a new trial without his personal presence during the proceedings, and that counsel was ineffective for failing to develop the record fully as to the involuntary nature of his guilty plea, has also been waived.

As noted in the procedural history outlined above, petitioner filed his motion for a new trial while his direct appeal was pending. When it was denied, the appeal of that denial was consolidated with the direct appeal. A single assignment of error was asserted relating to the motion for a new trial or new sentencing hearing. The only argument presented in support of that assignment of error (which stated that the trial court had erred in denying the motion) was that, on the merits, the motion should have been granted because the evidence showed that the State of Ohio, after obtaining a death sentence in petitioner's case by asserting that he was the principal offender, presented evidence in the co-defendant's trial that Wesley, rather than Stumpf, was the principal offender; and' that the trial court lacked jurisdiction

to render its ruling because the ruling was made by a two-judge panel, the third of the original three judges having died prior to the hearing.

Clearly, to the extent that petitioner argues in his habeas corpus petition that his presence was required at this stage of the proceedings before the Court could make a proper ruling, that issue was apparent from the face of the record and could have been raised on direct appeal. Since it was not, and petitioner has offered no excuse for his failure to raise that issue on direct appeal, that portion of the claim has been waived.

The other portion of the second part of petitioner's fifth claim is counsel's ineffectiveness for failing fully to develop the presentation of evidence as to why the guilty plea was not entered into knowingly, intelligently, and voluntarily. To some extent, that is a claim which should have been raised on direct appeal because it deals with the sufficiency of the record before the trial court. However, because it hinges on a claim of ineffective assistance of counsel, and the same counsel represented petitioner on direct appeal as at the trial and the motion for a new trial, the proper place to have raised that issue would have been in the post-conviction petition.

The third claim for relief in the post-conviction petition relates to the motion for a new trial. (Exhibit KK, at 19). One of petitioner's assertions was that counsel neglected to assure his presence at the hearing on the motion, which, again, is conceptually distinct from an assertion that the ruling itself was invalid because petitioner was not present at the hearing. However, the second part of that claim (Exhibit KK at 20), states in full as follows: "Counsel did not fully develop the presentation of evidence as to why my plea was not knowingly, intelligently and voluntarily made . . . ." The briefs on appeal contain sufficient references to the inadequacy of the record at the guilty plea proceeding to

preserve this issue for state court review. Consequently, the Court cannot find that this portion of the second of petitioner's fifth claims for relief has been waived.

IV. CONCLUSION

Based upon the foregoing, the Court finds that the following claims presented in the petition have been waived due to procedural default: Claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, Claim 3, and that portion of the second of petitioner's fifth claims which contends that the trial court erred in deciding his motion for a new trial without his personal presence. However, Claim 1.17 and that portion of the fifth claim which raises ineffective assistance of counsel for failing to develop the record as to the involuntary nature of petitioner's guilty plea have not been waived. The Court will issue a subsequent order dealing with the merits of those and other claims which have been properly preserved for federal habeas review.

/s/George T. Smith
United States District Judge

APPENDIX G

Supreme Court of Ohio

No. 86-1118

THE STATE OF OHIO, APPELLEE,

v.

STUMPF, APPELLANT

APPEAL from the Court of Appeals for Guernsey County.

In May 1984, Clyde Daniel Wesley and his friend, Norman Leroy Edmonds, set out from Texas in Edmonds' 1977 brown Pontiac Grand Prix. Edmonds took along his nine millimeter automatic handgun and a chrome-plated Raven .25 caliber automatic. Wesley had a .25 caliber Armi automatic. The two had finished their jobs as construction workers and planned to look for work in Florida. But first, Wesley wanted to stop in Washington, Pennsylvania to see his son. Along the way they stole a car in Oklahoma.

On May 13, the two arrived in Washington, Pennsylvania. The next day, with their weapons and a supply of beer in Edmonds' car, they made a call on appellant, John David Stumpf, a friend of Wesley. Stumpf joined them.

The three went to a bar in Washington where they drank six to eight beers. Then the three began driving around, drinking from the supply of beer in the car. Stumpf asked to see the .25 caliber Raven and Edmonds handed it to him. They drove into Ohio. As they drove and drank,

Wesley told Edmonds (who was driving) to pass another car on the roadway. As they did, Wesley, for sport, took a shot at the driver of the other car.

It was dusk when the three stopped along I-70. Saying they had to make a phone call, Stumpf and Wesley set out on foot for a nearby house (one hundred to one hundred fifty yards from the interstate), leaving Edmonds in the car.

Stumpf and Wesley rang the back doorbell. Mr. and Mrs. Norman Stout, who lived in the house, were seated at their kitchen table. Mary Jane Stout was paying bills. Norman Stout went to the door.

Stumpf and Wesley asked to use the phone and were invited in. After he finished with the phone, Stumpf took out his handkerchief and wiped it off.

Stumpf then asked Wesley, "Are you ready? Are you ready?"

"Not yet," Wesley answered.

Stumpf asked the question several times and received the same answer. During this time Norman Stout was cleaning his fingernails with a pocket knife. As Mr. Stout returned the knife to his pocket, Stumpf asked once more, "Are you ready?"

"Now, yes," said Wesley. The two turned, produced pistols and Wesley announced a robbery. Mr. Stout surrendered his billfold, which contained $117.

The Stouts were herded down the hall to a bedroom. There, Stumpf held the Stouts at gunpoint while Wesley ransacked the house. As Wesley continued his search, Stumpf's hand began to shake, holding the gun on the Stouts.

Norman Stout decided to walk around to the end of the bed. When he reached the end of the bed, Stumpf shot him between the eyes with the chrome-plated .25 caliber Raven automatic.

Stout kept going and grabbed Stumpf. The two grappled. Mr. Stout was pushed across the hall into another bedroom. He suffered a bruise consistent with being struck by the butt of a gun.

Mr. Stout does not remember being shot a second time, though a second bullet entered the top of his head. When he regained consciousness he was lying on the floor of the across-the-hall bedroom. He heard two male voices conversing in a normal tone. Then he heard the four shots that killed his wife. His next recollection was in the ambulance, on the way to the hospital. Mary Jane Stout, while still on the bed, was shot three times in the left side of her face and once in the left wrist.

Stumpf and Wesley left in Mary Jane Stout's Plymouth. Along the highway, Stumpf threw the pistol that had been used to shoot both Stouts out the window.

Meanwhile, Edmonds, back in his car, saw the outside floodlights come on at the Stout house. The garage door opened and a car backed out. Unbeknownst to Edmonds, it was Stumpf and Wesley in the car stolen from Mary Jane Stout. Edmonds became frightened and drove away. He stopped for gas in New Concord, Ohio and made a call to his family in Texas. When he left the gas station without paying, he was chased by two men. After stopping his car, he fired the nine millimeter pistol at them when they approached. Edmonds then turned the car and headed back to Washington, Pennsylvania.

On the day after the murder, Stumpf and Wesley abandoned Mrs. Stout's car. Before so doing, Stumpf wiped the car down because he "didn't want to get involved with it."

Stumpf, Wesley and Edmonds reunited in Pennsylvania. Edmonds wanted to sell his nine millimeter pistol to obtain traveling money for a return to Texas. Stumpf made a telephone call to arrange the sale. Stumpf took Wesley and Edmonds to the house of John Dino who bought the nine millimeter pistol and a .357 Magnum which had been stolen from Mr. Stout. Edmonds and Wesley then drove back to Texas.

Edmonds, traced by the long distance call, was arrested and told what he knew. Stumpf, upon learning of the warrant for his arrest, surrendered. At first he denied being in the Stout home, but upon being told that Norman Stout had survived, he admitted robbing the Stouts, admitted shooting Mr. Stout and admitted holding the Stouts at gunpoint. He said he left the Stout home after shooting Mr. Stout, and denied shooting Mrs. Stout. Later he changed his story again, claiming that he and Wesley had switched weapons and that he had never fired the chrome-plated Raven. However, Mr. Stout remembered being shot by Stumpf with the chrome-plated Raven and so testified at trial. He also picked Stumpf out of a photo line-up that included Wesley and Edmonds.

The four bullets removed from Mary Jane Stout's body and the bullet from the wound to the top of Norman Stout's head were all fired from the same .25 caliber weapon. The bullet fragment extracted from Norman Stout's forehead was too small to compare, but it did have the same width rifling marks as the other bullets that struck Norman and Mary Jane Stout. In all, eight spent .25 caliber shell casings were

recovered from the bedrooms and hallway, seven fired by the same weapon. The other one was fired by Wesley's Armi .25 caliber pistol.

Mr. Stout is left with numbness and lack of dexterity in his left arm, a loss of bowel and bladder control, and impaired ability to concentrate and remember. His disabilities are permanent.

Appellant, Stumpf, was indicted for aggravated murder (with four specifications), attempted aggravated murder (with one specification), aggravated robbery (with one specification), grand theft of an automobile, and grand theft of a firearm. Stumpf waived a trial by jury and requested a trial to a panel of three judges. Thereafter, he pleaded guilty to: (1) count one of the indictment, aggravated murder, in violation of R.C. 2903.01(B); (2) specification one of count one, the offense being committed for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder, R.C. 2929.04(A)(3); (3) specification four of count one, use of a firearm while committing a felony, R.C. 2941.141; (4) the second count in the indictment, attempted aggravated murder, in violation of R.C. 2923.02(A); and (5) the specification to the second count, use of a firearm while committing a felony, R.C. 2941.141. The three-judge panel, after hearing the evidence, unanimously found Stumpf guilty beyond a reasonable doubt of all the charges to which he had pleaded guilty.

At his sentencing hearing, Stumpf presented evidence in mitigation that although he dropped out of school in the tenth grade, he worked to his capacity during the fifth and sixth grades. Also, he lacked a significant history of convictions or juvenile adjudications. Various family members and friends testified as to their opinions that he did not display a violent temper, helped people, respected women, worked hard, and

was not a person who displayed leadership qualities. At the time of the offense, Stumpf was twenty-three years old.

Stumpf declined to be sworn. He made an unsworn statement on his own behalf admitting he went to the Stouts' home armed with a pistol. He claimed that Wesley was the one who used the telephone. He admitted holding the Stouts at gunpoint but said he was frightened and nervous; that Mr. Stout lunged at him and "[t]he gun went off." He said Mr. Stout shoved him across the hall into another bedroom. Stumpf said that Mr. Stout, although shot in the head, was able to knock the guns from both his and Wesley's hands. Stumpf claimed that Wesley said "shoot him"; and that Stumpf looked down and saw Wesley's black Armi .25. Stumpf said "I picked Dan's gun up and I fired and then at that time Mr. Stout fell on the floor." Stumpf said he went to the basement, backed the car out of the garage and was joined by Wesley. He denied shooting Mrs. Stout or being in the house when that happened. Stumpf said he was sorry for his acts.

The three-judge panel, after hearing the evidence, issued a separate opinion in which the judges unanimously concluded that the aggravating circumstances sufficiently outweighed the mitigating factors. Thus, the panel sentenced John David Stumpf to death.

On October 7, 1985, two of the three judges overruled Stumpf's motion for leave to withdraw his guilty plea or, in the alternative, to set aside his death sentence and order that a new sentencing hearing be conducted. The third judge had died during the interim.

On May 22, 1986, the court of appeals, pursuant to the mandate of R.C. 2929.05(A), reviewed the trial court proceedings, independently weighed the aggravating circumstance against the mitigating factors, and independently

considered whether the death sentence was appropriate. The court of appeals affirmed Stumpf's convictions and his death sentence.

For his limited testimony, Edmonds was permitted to plead guilty to involuntary manslaughter and aggravated robbery, and received a sentence of seven to twenty-five years concurrent with any sentence he received in Muskingum County for the gas station shooting. Wesley was subsequently found guilty of the same charges as Stumpf. In Wesley's trial by jury, the state presented testimony by Wesley's cellmate, James Eastman, to the effect that Wesley had admitted killing Mrs. Stout himself. It is undisputed that Wesley received a sentence of life imprisonment.

The cause is before this court upon an appeal as of right.

DISPOSITION: Judgment affirmed.

SYLLABUS:

1. Under R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.

2. Under R.C. 2929.04(B), evidence of an offender's history, background and character which the jury, trial court, or panel of three judges considered, but did not find to be mitigating, need be given little or no weight against the aggravating circumstances.

COUNSEL: C. Keith Plummer, prosecuting attorney, and James R. Scott, for appellee. Lewis M. Tingle and Craig Stephens, for appellant.

JUDGES: BROWN, J., MOYER, C.J., SWEENEY, LOCHER, HOLMES, DOUGLAS and WRIGHT, JJ., concur.

OPINION BY: BROWN

OPINION

As with every case in which the death penalty has been imposed, the instant appeal presents us with a three-step task, pursuant to R.C. 2929.05. First, we must consider the specific issues raised by appellant in his propositions of law. Second, we must independently weigh the aggravating circumstance of which appellant was found guilty beyond a reasonable doubt against the mitigating factors. Finally, we must independently decide whether the death sentence is appropriate in this case, and whether it is proportionate to the penalty imposed in similar cases. For the reasons set forth below, we affirm the judgment of the court of appeals and uphold the sentence of death.

A

Appellant's first proposition of law contends that the three-judge panel failed to adequately comply with R.C. 2929.03(F), which provides in part:

"The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, *and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.* * * *" (Emphasis added.)

The three-judge panel did list their reasons for finding that the aggravating circumstance sufficiently outweighed the mitigating factors. n1 However, appellant claims that such reasons fail to "bear a direct relation" to the specific aggravating circumstance of which he was found guilty, to wit: the murder of Mrs. Stout to escape detection, apprehension, trial or punishment for other offenses (attempted aggravated murder and aggravated robbery).

n1 The three-judge panel found:

"D. REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS:

"1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

"2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

"a. Wiping of fingerprints from the telephone.

"b. The dialogue of the Defendant with his companion. * * *

"c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

"d. Continual holding [of] both victims at gunpoint by the Defendant.

"e. The Defendant shooting the male victim at close range between the eyes.

"f. The Defendant firing a second shot into the head of the male victim.

"g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

"3. Failure of the Defendant and his companion to render assistance to the victims.

"4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

"5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

"6. The Course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

"7. The Defendant's companion firing a gun into a passing vehicle in [*sic*] route.

"8. The Defendant made no effort to disassociate himself from his companions.

"9. The direct evidence of a gang operation of robbery, assault and other crimes."

The three-judge panel, in stating its reasons, relies heavily upon the nature and circumstances of appellant's offense. Appellant's argument thus assumes that the nature and circumstances of his offense cannot be cited as reasons for, and bear no relation to, the finding that the aggravating circumstance sufficiently outweighs the mitigating factors.

This assumption is erroneous. R.C. 2929.04(B) *requires* the jury, trial court, or three-judge panel to "*consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *." (Emphasis added.) In a particular case, the nature and circumstances of the offense may have a mitigating impact, or they may not. See *State v. Steffen* (1987), 31 Ohio St. 3d 111, 117, 31 OBR 273, 278, 509 N.E. 2d 383, 390. Either way, they must be considered.

Reading R.C. 2929.03(F) and 2929.04(B) *in pari materia*, it would be illogical to require a three-judge panel to consider the nature and circumstances of the offense in making its decisions whether the aggravating circumstances were sufficient to outweigh the mitigating factors, yet to forbid that panel from relying upon and citing such nature and circumstances as reasons for its decision.

We therefore hold that under R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.

B

In his second proposition of law, appellant maintains that the three-judge panel erred by failing to "consider, and weigh against the aggravating circumstances proved beyond a

reasonable doubt, * * * the history, character, and background of the offender * * *," as required by R.C. 2929.04(B).

Appellant introduced exhibits and called witnesses to demonstrate that his history, character and background included certain alleged mitigating factors. The witnesses were cross-examined only briefly or not at all. While some of the exhibits and testimony were unreliable, several witnesses established, among other things, that appellant was a follower and not a leader, that he was generally a hard worker, that he had never had behavioral problems, that he had no significant criminal record, that he had a strong family background, and that he was emotionally stable. The panel recited the alleged mitigating factors on which appellant offered evidence, but found that, with the exception of age at the time of the offense (twenty-three) and his lack of a significant criminal background, appellant had not established any mitigating factors by a preponderance of the evidence. n2

n2 The panel's opinion states:

"A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

"The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

"1. The nature and circumstances of the offense.

"2. The history, character and background of the offender. * * *

"We find that the Defendant has established by a preponderance of the evidence the following mitigating factors:

"1. The youth of the offender—age 23.

"2. That although the Defendant had been found guilty of certain offenses in his home community, the Defendant lacked significant history of prior criminal conviction and delinquency adjudications.

"We further find that the Defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04.

"B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

"The Defendant presented the following factors *which the Court has considered*:

"1. Evidence of character.

"2. Use of alcohol and drugs.

"3. Employment history.

"4. Emotional stability.

"5. Family relationships.

"6. Educational background and native intelligence.

* * *

"7. Unverified and unattested questionnaires on John David Stumpf. * * * The alleged preparer's name appears in response to Question No. 30 with no indication it is or is intended as a signature. The questionnaries [*sic*] were prepared by person or persons unknown.

"8. Summary results of questionnaires. * * *

"9. Leadership qualities.

"Factors 1 through 9 were not established *as mitigating factors* by a preponderance of the evidence." (Emphasis added.)

Appellant claims that the three-judge panel erred in finding that the other factors had not been proven—thus implicitly not weighing them against the aggravating circumstance. Appellant maintains that R.C. 2929.04(B) requires the panel to both consider *and weigh* his history, character, and background as mitigation; therefore, the panel erred when it failed to weigh the factors which it found had not been established by a preponderance of the evidence.

A careful reading of the panel's opinion demonstrates that it found only that such factors were not established *as mitigating factors* by a preponderance of the evidence. As we recently held in *Steffen*, supra, at paragraph two of the syllabus:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude

to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight."

This reasoning applies with equal force to evidence of the history, character and background of an offender. As with the nature and circumstances of the offense, evidence of a particular offender's history, character and background may be mitigating, or it may not be. R.C. 2929.04(B) requires a trial court or three-judge panel to *consider* such evidence (as did the panel in the cause *sub judice*), but it does not require that court or panel to find that such evidence establishes a mitigating factor or factors. As we explained in *Steffen*, "[e]vidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances." *Id.* at 129, 31 OBR at 289, 509 N.E. 2d at 399. Therefore, we hold that under R.C. 2929.04(B), evidence of an offender's history, background and character which the jury, trial court, or panel of three judges considered, but did not find to be mitigating, need be given little or no weight against the aggravating circumstances.

C

In his third proposition of law, appellant claims that his death sentence is disproportionate to the penalties imposed in similar cases. R.C. 2929.05(A) mandates a proportionality review by this court in all cases where a sentence of death has been imposed. *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264, paragraph seven of the syllabus; *Steffen*, supra, at 122-123, 31 OBR at 283-284, 509 N.E. 2d at 394. We therefore discuss this issue in Part III of this opinion, infra.

D

Appellant's fourth proposition of law asserts that the three-judge panel, by imposing a requirement (allegedly only *after* the conclusion of his sentencing hearing) that he prove his mitigating factors by a preponderance of the evidence, denied him due process and equal protection and violated R.C. 2929.03(D)(1). R.C. 2929.03(D)(1) provides, in part:

"The defendant shall have the *burden of going forward with the evidence* of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."(Emphasis added.)

In *Jenkins*, supra, we explained that the "burden of going forward" placed upon a defendant by R.C. 2929.03(D)(1) in fact requires him or her to establish the existence of any mitigating factors by a preponderance of the evidence. *Id.* at 171-172, 15 OBR 317-318, 473 N.E. 2d at 275. In *Jenkins*, we relied in part upon the Committee Comment to the former R.C. 2929.03, which provided that "'[m]itigation must be established by a preponderance of the evidence * * *.'" *Id* at 171, 15 OBR at 317, 473 N.E. 2d at 275.

Appellant appears to make two separate arguments: (1) *Jenkins* was wrongly decided on this point, and (2) even if *Jenkins* was correctly decided, the appellant was still denied due process and equal protection because he was not provided with notice that he would have to bear the burden of

proving his mitigating factors by a preponderance of the evidence since *Jenkins* was decided after his sentencing hearing took place.

As to appellant's first argument, we think *Jenkins* sets forth the correct interpretation of R.C. 2929.03(D)(1), and we decline to modify it. R.C. 2929.04(C), which must be read *in pari materia* with R.C. 2929.03(D)(1), provides:

"The *defendant* shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"The *existence* of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing." (Emphasis added.)

In *Kennedy v. Walcutt* (1928), 118 Ohio St. 442, 455, 161 N.E. 336, 340, this court explained that "[t]he burden of proof imposed by law upon one who must prove the *existence* of a fact or a thing necessary to be proven in the prosecution or the defense of a lawsuit means the *obligation to show it by proof*." (Emphasis added.) Further, as one leading commentator has summarized: "The most acceptable meaning to be given to the expression, *proof by a preponderance*, seems to be proof which leads the jury to find that *the existence of the contested fact is more probable than its nonexistence*." (Emphasis added.) McCormick, Evidence (3 Ed. Cleary Ed. 1984) 957, Section 339. Finally, as this court emphasized in *Travelers' Ins. Co. v. Gath* (1928), 118 Ohio St. 257, 261, 160 N.E. 710, 711, "a preponderance of evidence means the greater weight of evidence. * * * The

greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium."

Thus, reading R.C. 2929.03(D)(1) together with R.C. 2929.04(C) demonstrates that it is incumbent upon a defendant to show the *existence* of mitigating factors; hence, as *Jenkins* holds, the defendant bears the burden of establishing such factors by a preponderance of the evidence. Of course, the burden of proving beyond a reasonable doubt that the aggravating circumstance(s) outweighs the mitigating factor(s) is on the state and never shifts.

As to appellant's second argument, we cannot agree that at the time of his sentencing hearing, he had no notice that he would bear the burden of proving his mitigating factors. *Jenkins* did not make new law on this issue. Rather, *Jenkins* sets forth the logical reading of R.C. 2929.03(D)(1). The notice, which appellant claims was lacking, was contained in that statute, the Committee Comment, R.C. 2929.04(C), and prior case law.

E

Appellant's fifth proposition of law maintains that the three-judge panel failed to engage in a meaningful weighing of the mitigating factors against the aggravating circumstance, pursuant to R.C. 2929.03(F). Appellant claims that the panel's opinion is insufficient to comply with the statutory requirements, and thus tends to "trivialize the duty of the [panel] * * * to articulate its reasoning * * *." *State v. Maurer* (1984), 15 Ohio St. 3d 239, 247, 15 OBR 379, 386, 473 N.E. 2d 768, 778.

We have already rejected much of appellant's argument. The panel's opinion clearly and concisely sets forth its findings as to: (1) the existence of any of the mitigating factors listed in R.C. 2929.04(B), (2) the existence of any

other mitigating factors, (3) the aggravating circumstance appellant was found guilty of committing, and (4) the panel's reasons why the aggravating circumstance sufficiently outweighs the mitigating factors. We believe the three-judge panel thereby discharged its duties under R.C. 2929.03(F).

F

In his sixth proposition of law, appellant claims that the aggravating circumstance does not outweigh the mitigating factors. R.C. 2929.05(A) indeed requires us to undertake an independent review of this question, which we set forth in Part II of this opinion, infra.

G

Appellant's seventh proposition of law contends that his death sentence and the statutes authorizing it are unconstitutional because the death penalty is not the least restrictive means by which the state of Ohio can achieve a compelling governmental interest. This court rejected the argument in *Jenkins*, supra, at 168, 15 OBR at 314, 473 N.E. 2d at 272, and we reaffirm *Jenkins* for the reasons set forth therein.

H

Appellant's eighth proposition of law maintains that the Ohio death penalty statutes, as applied to him, violate the constitutional prohibition against cruel and unusual punishment. In *Jenkins*, supra, at 168, 15 OBR at 314, 473 N.E. 2d at 273, we upheld the validity of the death penalty statutes against a similar cruel and unusual punishment

attack. See *id.* at paragraph one of the syllabus. See, also, *Gregg v. Georgia* (1976), 428 U.S. 153, 187. We reaffirm *Jenkins* for the reasons set forth therein.

I

In his ninth proposition of law, appellant argues that the aggravating circumstance set forth in R.C. 2929.04(A)(3) is unconstitutionally overbroad and vague, because it could apply to virtually all aggravated murders when some other crime has also been committed. R.C. 2929.04(A)(3) provides:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

"* * *

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

We disagree with appellant that subsection (3) fails to define and narrow the class of death-eligible offenders. The unambiguous language of that subsection requires that the offense (for example, the murder of a witness to another crime) be committed for the *purpose* of escaping detection, apprehension, trial or punishment for another, separate offense. The statute neither states nor permits an inference that *every* intended killing which follows another crime allows the death penalty to be imposed.

J

In his tenth proposition of law, appellant contends that the mitigating factors set forth in R.C. 2929.04(B)(1) through (7) are unconstitutionally vague, with the result that the three-judge panel imposed the death penalty upon him in an arbitrary manner. The seven mitigating factors set forth in R.C. 2929.04(B) are drawn broadly in order to provide latitude to a defendant with respect to the introduction of evidence upon and establishment of mitigating circumstances. See *California v. Ramos* (1983), 463 U.S. 992, 998-1001. Indeed, R.C. 2929.04(B)(7) allows a defendant to introduce evidence upon and establish "*[a]ny other factors* that are relevant to the issue of whether the offender should be sentenced to death." (Emphasis added.)

We discern no constitutional infirmity in R.C. 2929.04(B)(1) through (7). These factors are broad enough to enable a defendant to present any favorable evidence relevant to the jury's, trial court's, or three-judge panel's decision whether to impose the death penalty, yet at the same time are sufficiently specific to guide the decision-maker's analysis in weighing the mitigating factors against the aggravating circumstances. See *Proffit v. Florida* (1976), 428 U.S. 242, 257-258. The mitigating factors set forth in R.C. 2929.04(B)(1) through (7) prevent an arbitrary or a mechanical imposition of a death sentence.

K

Appellant asserts in his eleventh proposition of law that the panel erred in denying his motion for leave to set aside his guilty plea or to set aside his sentence and order a new sentencing hearing. Appellant bases this claim upon testimony by a cellmate of Clyde Daniel Wesley. During

Wesley's trial, the cellmate testified that Wesley said that he, Wesley, had shot Mrs. Stout. Wesley was not available to testify at appellant's sentencing hearing.

In order to withdraw a guilty plea after sentencing has taken place, a defendant must show that such withdrawal is necessary to correct manifest injustice. Crim. R. 32.1; *State v. Smith* (1977), 49 Ohio St. 2d 261, 3 O.O. 3d 402, 361 N.E. 2d 1324, paragraph one of the syllabus; *State v. Caraballo* (1985), 17 Ohio St. 3d 66, 67, 17 OBR 132, 477 N.E. 2d 627, 628. Further, "[a] motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Smith*, supra, at paragraph two of the syllabus. See, also, *Caraballo*, supra, at 67, 17 OBR at 133, 477 N.E. 2d at 628.

A plea of guilty is a complete admission of guilt. By entering his guilty plea to the principal charge and to the specification under R.C. 2929.04(A)(3), appellant admitted that *he* murdered Mary Jane Stout for the purpose of avoiding detection, apprehension, trial or punishment for *his* crimes of attempted aggravated murder and aggravated robbery. Appellant makes no claim that his plea was not entered knowingly, intelligently, and voluntarily. The three-judge panel questioned appellant extensively prior to accepting his guilty plea. He indicated that he made an informed and knowledgeable plea, with full realization as to its effect. Based upon appellant's guilty plea and the evidence adduced at his sentencing hearing, we cannot say that the panel abused its discretion or that appellant met his burden of showing that manifest injustice had occurred. Thus, we uphold the panel's decision not to permit appellant to withdraw his plea.

As to his request to have his sentence set aside and a new sentencing hearing conducted, appellant claims that the

three-judge panel's finding that he was the principal offender, in light of the later testimony from Wesley's cellmate, mandates that his motion be granted. Appellant concedes that R.C. 2929.04(A)(3), the aggravated circumstance to which he pleaded guilty, contains no requirement that he have been the principal offender. Nevertheless, appellant maintains that the testimony would have tended to establish a mitigating factor under R.C. 2929.04(B)(6), and therefore a new sentencing hearing is necessary in order to allow the panel to consider it.

Appellant's motion is similar to a motion for new trial based upon newly discovered evidence, under Crim. R. 33(A)(6). In *State v. Williams* (1975), 43 Ohio St. 2d 88, 72 O.O. 2d 49, 330 N.E. 2d 891, paragraph two of the syllabus, this court held: "The allowance of a motion for a new trial on the grounds of newly discovered evidence is within the competence and discretion of the trial judge; and in the absence of a clear showing of abuse such decision will not be disturbed." We adopt this standard of review for the motion at issue. With the latitude granted to a defendant in presenting evidence of mitigation, such a standard is necessary. A defendant is not entitled to a new sentencing hearing merely by coming forward with some additional evidence after the initial sentencing hearing.

The panel, upon consideration of appellant's motion, apparently determined that Eastman's testimony added insufficient mitigating weight to affect its balancing of the mitigating factors against the aggravating circumstance. See R.C. 2929.04(C). We find no error in that determination. Eastman's testimony is hearsay and, in the face of the evidence adduced at appellant's sentencing hearing, of minimal weight. As such, it is too attenuated to warrant a

vacation of appellant's sentence and a new sentencing hearing. We therefore find that the panel did not abuse its discretion in denying appellant's motion.

L

In appellant's twelfth proposition of law, he maintains that it was error for only two judges to consider his post-sentence motions, inasmuch as R.C. 2945.06 requires a three-judge panel. Three-judge review was precluded here by the death of one of the judges.

R.C. 2945.06 expressly provides that "[t]he judges *or a majority of them* may decide all questions of fact and law arising upon the trial * * *." (Emphasis added.) Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

II

Having considered the issues raised in appellant's propositions of law, we turn to an independent weighing, as required by statute, of the aggravating circumstance and mitigating factors.

The aggravating circumstance which appellant was found guilty of committing beyond a reasonable doubt is that he murdered Mary Jane Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. R.C. 2929.04(A)(3).

Against this aggravating circumstance we weigh all mitigating factors drawn from: (1) the nature and circumstances of the offense, (2) the history, background and

character of appellant, and (3) any of the factors listed in R.C. 2929.04(B)(1) through (7) which exist in this case.

We find the nature and circumstances of Mrs. Stout's murder to be particularly heinous, as evidenced by: (1) the fact that appellant shot and severely injured Mr. Stout and then, to escape detection, apprehension, trial or punishment, brutally murdered Mrs. Stout; (2) the fact that Mrs. Stout was shot three times in the face after appellant and his co-defendant discussed her fate; and (3) the fact that this senseless slaying of an innocent and unsuspecting citizen occurred after the invasion of her home, which she and her husband voluntarily permitted as an accommodation to passing strangers. We find that the nature and circumstances of this offense are entitled to no weight as mitigation.

At his sentencing hearing, appellant presented a substantial amount of evidence pertaining to his history, background and character. Specifically, appellant presented evidence of the following allegedly mitigating factors: (1) his history of fairly regular employment, (2) his good emotional stability, (3) his strong family background, (4) his average intelligence, (5) his lack of alcohol or drug abuse, and (6) his susceptibility to being directed or dominated by others. In our independent review, we find that all six of these factors are entitled to *some* mitigating weight.

To the aggregate weight of these mitigating factors, we add the weight of the factors set forth in R.C. 2929.04(B)(1) through (7) which are present in this case. We find that factors (1), (2), (3) and (6) are not present and thus are not entitled to any weight. In determining factor (6) not to be present, we find that the testimony of a cellmate during Clyde Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing.

We find that factors (4) and (5) are present in this case. Appellant was twenty-three at the time of his offense; and we assign some, but not much, weight to that factor. Appellant does not have a significant history of prior criminal convictions and delinquency adjudications; and we assign this factor somewhat greater weight.

Finally, under factor (7), appellant voluntarily turned himself in to the police, pleaded guilty rather than demanding a hopeless trial, and professed remorse for his acts. However, we find that these things are entitled to little weight as mitigation in this case. Appellant turned himself in only after Edmonds had been arrested and had named him as a participant. Further, appellant pleaded guilty and professed remorse only after changing his story several times and after learning that Norman Stout had survived. Under such circumstances, appellant's cooperation with the authorities, guilty plea, and belated remorse are of minimal mitigating value.

Our independent weighing of all the mitigating factors against the aggravating circumstance leads us to conclude that that aggravating circumstance does outweigh the mitigating factors present in this case beyond a reasonable doubt.

III

Our final task is to determine whether the sentence of death is appropriate. In this determination, we must "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A).

Appellant cites us to several somewhat similar cases which resulted in life sentences, and argues that his sentence was therefore excessive and disproportionate. However, earlier this term in *Steffen*, supra, at paragraph one of the syllabus, we held that "[t]he proportionality review required

by R.C. 2929.05(A) is satisfied by a review of *those cases already decided by the reviewing court in which the death penalty has been imposed*." (Emphasis added.) We further clarified that "proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was *sought but not obtained* or where the death penalty could have been sought but was not." (Emphasis added.) *Id.* at 124, 31 OBR at 284, 509 N.E. 2d at 395.

With that in mind, we now examine the cases in which this court has affirmed the imposition of the death sentence. In *State v. Barnes* (1986), 25 Ohio St. 3d 203, 212, 25 OBR 266, 274, 495 N.E. 2d 922, 929, we summarized the cases to date wherein we had upheld the imposition of the death penalty under the current statutory scheme:

"* * * *State v. Jenkins*, supra (15 Ohio St. 3d 164), involved the murder of a police officer during a bank robbery. In *Jenkins* the defendant was mentally deficient as evidenced by a very low I.Q., and yet the death penalty was upheld. *State v. Maurer* (1984), 15 Ohio St. 3d 239, involved the heinous crimes of rape and murder of a young girl. *State v. Rogers* (1985), 17 Ohio St. 3d 174 [vacated *sub nom. Rogers v. Ohio* (1985), 474 U.S. , 88 L. Ed. 2d 452, *on remand* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52, *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581], dealt with a similarly heinous fact pattern and a defendant with extreme mental problems. In both of these cases this court (with the exception of Justice Wright in *Rogers*) found the death penalty appropriate. *State v.* Mapes (1985), 19 Ohio St. 3d 108, and *State v. Martin* (1985), 19 Ohio St. 3d 122, * * * involved robbery-murder and defendants with no significant evidence offered in mitigation. This court found capital punishment an appropriate sentence for these types of cases. In *State v. Williams* (1986), 23 Ohio St. 3d 16, where robbery was again the aggravating

circumstance and an elderly woman was the victim, this court upheld a death sentence. In addition, this court recently upheld a death sentence in *State v. Buell* (1986), 22 Ohio St. 3d 124, for murder during a kidnapping. Finally, this court upheld death sentences in *State v. Brooks* (1986), 25 Ohio St. 3d 144, involving the murders of the defendant's three sons."

Barnes, supra, involved the murder of a night porter at a bar during the commission of aggravated burglary and aggravated robbery. In *State v. Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55, we upheld a death sentence imposed for the murder of the owner of a delicatessen during an aggravated robbery of her establishment. *State v. Glenn* (1986), 28 Ohio St. 3d 451, 28 OBR 501, 504 N.E. 2d 701, involved the murder of a reserve deputy sheriff while he was transporting a prisoner, in a squad car. In *Steffen*, supra, we upheld the imposition of a death sentence for the rape and murder of a young woman during an aggravated burglary. Finally, in *State v. Zuern* (1987), 32 Ohio St. 3d 56, 512 N.E. 2d 585, we upheld a death sentence imposed for the murder of a corrections officer in a detention facility.

From our review of the relevant cases, we conclude the imposition of the death penalty in the cause *sub judice* is neither excessive nor disproportionate. Further, the fact that appellant's co-defendant Wesley received a life sentence with parole eligibility after twenty years for his part in Mrs. Stout's murder is not an impediment to affirming the death sentence in the instant case. The life sentence given to Wesley is the verdict of a jury in a separate trial. Proportionality review in the cause *sub judice* does not require a reweighing of the aggravating circumstances against the mitigating factors in Wesley's case.

Finally, we believe that a sentence of death is an appropriate penalty for the calculated execution of Mary Jane Stout, committed in order to escape detection, apprehension,

trial or punishment for appellant's other offenses (the aggravated robbery of the Stouts and the attempted aggravated murder of Norman Stout).

IV

We have completed our review of the record in the cause *sub judice*. We conclude that the three-judge panel properly weighed the aggravating circumstance against the mitigating factors. We are convinced beyond a reasonable doubt that the evidence supports the panel's determination that the aggravating circumstance that appellant was found guilty of committing outweighs the mitigating factors, and we are persuaded from our independent review to make that same determination. Lastly, we find that the imposition of a death sentence is neither excessive nor disproportionate, and we believe that sentence to be appropriate under the circumstances of this case.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 87-6019

Stumpf, John David, Petitioner
v.

Ohio

February 22, 1988

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

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OPINION

The petition for writ of certiorari to the Supreme Court of Ohio is denied.

DISSENT BY: Brennan; Marshall

DISSENT

Justice Brennan and Justice Marshall dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. 87-6019

Stumpf, John D.

v.

Ohio

April 18, 1988

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

OPINION

The petition for rehearing is denied.

APPENDIX J

Court of Appeals of Ohio
Fifth Appellate District
Guernsey County

Case Nos. CA-760, CA-793

STATE OF OHIO, Plaintiff-Appellee,
vs.
JOHN DAVID STUMPF, Defendant-Appellant.

Criminal Appeal from Court of Common Pleas,
Case No. 9684

May 22, 1986

JUDGES: MILLIGAN, J. concurs.
WISE, J. concurs and dissents separately.

COUNSEL: For Plaintiff-Appellee: C. KEITH PLUMMER Prosecuting Attorney, 139 Courthouse Square Cambridge, Oh 43725; JAMES R. SCOTT Special Assistant Prosecuting Attorney, 139 Courthouse Square, Cambridge, OH 43725
For Defendant-Appellant: LEWIS M. TINGLE 138 N. Seventh St., Cambridge, OH 43725; CRAIG STEPHENS 206 S. Meridian St. Ravenna, Oh 44266

OPINION BY: PUTMAN

OPINION

JOURNAL ENTRY OF JUDGMENT AND OPINION
AND FINDINGS OF THE COURT

PUTMAN, P.J.

Appeal Case No. 760 is from a death sentence and appeal Case No. 793 is from the judgment denying the motion to withdraw the plea of guilty that led to the conviction and sentence.

We affirm both judgments.

We also have independently given de novo consideration to the record and make the certifications upon the issues enumerated in R.C. 2929.05.

Our reasons follow.

Very little is in dispute in this case. Appellant's major thrust has been that the state accused him of acting in concert with one Clyde Wesley in killing the victim, and in a subsequent separate trial, convicted Wesley of being a direct actor in the same killing for which Wesley escaped the death penalty. The argument is made that for that reason the death penalty is, within the meaning of R.C. 2929.05, "excessive or disproportionate to the penalty imposed in similar cases." Appellant urges this as a matter of error review and also independently addresses that argument to our de novo consideration.

We reject the argument that where two or more persons act in concert as principal offenders none may be lawfully executed unless all are. Logically this is a reprise of the old theme that no one may be the first to die. We rejected this in State v. Maurer. The 1984 affirmance of judgment is reported in 15 Ohio St.3d 239.

The more significant question is the proper handling of that subsequent "mercy verdict" in our de novo consideration reviewing and independently weighing all of the facts and other evidence disclosed in the record. Should we elect to withhold our independent approval of the death penalty because of it?

By agreement of the prosecutor the appellant has been given leave to raise that issue as a supplement to his assignments of error upon the direct appeal (Case No. 760) as well as the appeal from the denial of the motion to withdraw the guilty plea (Case No. 793). We handle it on the law side in both cases and de novo as a factual consideration in the direct appeal from the death sentence.

A more detailed statement follows.

STATEMENT OF THE CASE

Appellant concedes the accuracy of the following statement of the case contained in the state's brief.

During the May, 1984 term of court, the Guernsey County Grand Jury returned a five count indictment against John Stumpf, defendant-appellant herein. Stumpf was charged with the May 14, 1984 aggravated murder of Mary Jane Stout, and the attempted murder of her husband, Norman Stout, as well as aggravated robbery, grand theft of a motor vehicle and grand theft of a firearm. Amended without objection, count one alleged that the purposeful killing of Mrs. Stout took place during an aggravated robbery. Count one contained the additional specifications that the purposeful killing was committed to escape detection, apprehension, trial and punishment for the crimes of attempted aggravated murder and aggravated robbery; that the killing was part of a course of conduct involving the purposeful killing or attempt to kill two persons; that the killing was committed in the course of

an aggravated robbery and appellant Stumpf was the principal offender of the aggravated murder and, finally, that the offenses were committed while the offender was armed with a firearm.

Count two alleged the attempted aggravated murder of Norman Stout, committed in the course of an aggravated robbery. The indictment included firearms specifications as well as counts for aggravated robbery and grand theft.

Appellant waived trial by jury and three judges were impaneled to hear the case pursuant to R.C. 2945.06. On September 17, 1984, appellant entered a guilty plea to count one of the indictment, the aggravated murder of Mary Jane Stout. Appellant also entered a guilty plea to specification one, admitting that his purposeful murder of Mary Jane Stout was done to escape detection, apprehension, trial or punishment for aggravated robbery and the attempted aggravated murder of Norman Stout. Appellant also entered a guilty plea to count two, the attempted aggravated murder of Norman Stout and two gun specifications, R.C. 2929.71. Pursuant to R.C. 2945.06, the three judge panel heard witnesses and evidence, accepted the pleas, and found appellant guilty of the offenses and the specifications.

Following the hearing conducted pursuant to R.C. 2929.03, the panel unanimously found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The three judge panel imposed the death penalty for the aggravated murder of Mary Jane Stout, and a term of seven to twenty-five years for the attempted aggravated murder of Norman Stout. An additional term of three years actual incarceration was imposed on the firearm specification. On the same date, the three judge panel filed a separate opinion pursuant to R.C. 2929.03(F) stating its specific findings as to the existence of any mitigating factors, the aggravating circumstances, and the reasons why the

aggravating circumstances, and the reasons why the aggravating circumstances outweighed any mitigating factors. Appellant filed a timely notice of appeal from that judgment of the trial court which appeal is currently pending before this court under Case No. CA-760.

Subsequent to appellant's guilty pleas and sentence, co-defendant Clyde Wesley was tried before a jury for the identical crimes. Wesley was found guilty. The jury recommended a sentence of life imprisonment with parole eligibility after twenty years. At Wesley's trial, an inmate of the jail testified that Wesley had declared to him that he, Wesley, had shot Mary Jane Stout. Based on this testimony, appellant Stumpf moved the trial court for leave to withdraw his guilty plea or in the alternative, for a new sentencing hearing. The trial court overruled the motions. Appellant now seeks review by this court.

STATEMENT OF THE FACTS

The appellant states the facts as follows.

On May 11, 1984, two friends, Clyde Daniel Wesley and Norman Leroy Edmonds, left the State of Texas in Edmond's car. They took with them a 25 caliber RAVEN automatic and Italian 9 millimeter automatic handgun, both owned by Edmonds along with another 25 caliber pistol owned by Wesley. Their destination was Washington, Pennsylvania, and along the way, Wesley stole a car in Oklahoma.

They were unemployed at the time and their intention was to see relatives in Pennsylvania and then go on to Florida. In addition to the guns, they traveled with a supply of beer in their vehicle.

Wesley had lived in Pennsylvania near the defendant John Stumpf prior to moving to Texas and on May 14, he and Edmonds drove to Stumpf's residence in Cannonsburg, Pennsylvania. The three then went to a bar in Edmonds' car. After consuming six or eight beers, they left the bar and began driving around. Wesley was driving with Edmonds in the front seat and John Stumpf in the back. More beer was available in the car and was being consumed to the point of intoxication. Due to Wesley's bad driving, Edmonds took over and Wesley sat in the front passenger seat.

The car was driven from Pennsylvania to Ohio and while passing through Belmont County, Edmonds passed another vehicle. At that point, Wesley, using the 9 mm. pistol and without provocation, shot the driver of the vehicle they were passing. Later, Edmonds stopped the car along Interstate 70 in Guernsey County, at a time when it was just getting dark. Wesley suggested they go to the Stout residence, so he and John Stumpf went down an embankment and toward the house while Edmonds waited at the car. They asked to use the phone and were admitted into the Stout residence by Mr. Stout. Once in the residence, two of the guns which Wesley brought from Texas were produced. Mr. and Mrs. Stout were held at gunpoint, and were told by Wesley that "this was a stickup."

John Stumpf became noticeably upset and nervous as he stayed with Mr. and Mrs. Stout, while Wesley went through the house searching for items to steal. Mr. and Mrs. Stout were seated on a bed in the bedroom while Wesley was out of the room. Mr. Stout got up and moved toward John Stumpf. At this point, John Stumpf described himself as being very nervous and scared, and the gun went off with the bullet striking Mr. Stout in the head.

Mr. Stout continued toward John Stumpf, grabbed him and shoved him out of the bedroom where Mrs. Stout

remained. During this scuffle, Stumpf dropped his gun. Mr. Stout's momentum carried him across the hall where he scuffled with Wesley. Wesley's gun fell to the floor and at Wesley's urging, Stumpf picked it up and fired toward Mr. Stout, although Mr. Stout can't recall this part of the incident.

Mr. Stout has no specific recollection beyond this point, except for hearing voices and four gunshots. The only account thereafter comes from the defendant, John Stumpf, who related how Wesley said something to him but he told Wesley he was getting out of there and left the house via the garage. Mrs. Stout was still alive in the bathroom.

Wesley came downstairs to the garage and called John back in to drive the Stout's car. Norman Edmonds had been waiting on the road but then left the scene. He became involved in the theft of gasoline at a nearby service station and when he was chased by individuals from the gas station, he used the 9 mm. which he had kept in the car and fired at them without hitting anyone. Edmonds had made a phone call to his father in Texas from the gas station, which later led to his identification. The three then returned to Pennsylvania, where the Stout's car was left.

Wesley also had Mr. Stout's 357 Magnum pistol in his luggage, which they sold along with Edmonds' 9 mm. pistol. Wesley and Edmonds then left for Texas.

Tracing Edmonds through the phone call to his father resulted in his apprehension, which then resulted in the identification of the other two.

Learning of the warrant for him, John Stumpf went to the police station in Pennsylvania where he met with Lt. Van Horn of the Guernsey County Sheriff's Department. John then waived extradition and returned to Ohio.

For his limited testimony, Edmonds was permitted to enter a plea to a manslaughter charge, and received a sentence of seven to twenty-five years, concurrent with any sentence he received in Muskingum County for the gas station shooting. In the meantime, Clyde Daniel Wesley fought his extradition from the State of Texas. Wesley was indicted on identical charges and specifications as this defendant.

The State of Ohio acting through the prosecutor outlines the facts as follows:

Between nine and ten o'clock p.m. on May 14, 1984, Chris Stout, son of Norman and Mary Jane Stout attempted to reach his parents by telephone at their home. The Stout's residence was located on County Road 44 and was visible from Interstate Highway 70 as it passed through Guernsey County. Mrs. Stout was ill with influenza. Both were expected to be at home. After unsuccessfully telephoning some seven or eight times, Chris Stout contacted a neighbor of his parents, John Barrone. Barrone investigated and found the home open and outdoor emergency lighting on. With this information Chris Stout telephoned police who investigated and found Mrs. Stout slain and Mr. Stout gravely wounded.

Guernsey County Sheriff's Sgt. Mike Warner found Mrs. Stout lying on a bed in one bedroom designated at trial as bedroom number two and Mr. Stout lying on the floor in what was designated as bedroom number one. Both had been shot. Spent .25 caliber shell casings were recovered from the hallway area between the two bedrooms. A bullet was located in the wall of bedroom number two, while another bullet was found in the floor of bedroom number one. Exhibit "J" was a bullet found in the mattress in bedroom number one.

Norman Stout was transported to Bethesda Hospital for emergency treatment of two gunshot wounds to the head. Dr. Albert Camma, neurosurgeon, performed emergency surgery.

Stout had been shot once between the eyes and once in the top of the head. The nasal wound showed powder burns above the bridge of the nose. Dr. Camma observed and "L" shaped bruise on the right forehead which, in his opinion, was consistent with a blow from the butt of a gun. Camma recovered the bullets from both the gunshot between the eyes and the gunshot to the top of the head. Exhibit "G" was the bullet recovered from the wound in the top of the head.

Dr. Thomas Arejola, clinical pathologist, performed the autopsy upon the body of Mary Jane Stout. Arejola found one spent bullet in the victim's left breast pocket. Arejola observed four entrance wounds in the body of Mrs. Stout: three in the face, one in the left wrist. One entrance wound was to the left side of the face, in front of the left ear. A second wound was slightly below the first while the third entered the area of the left jaw. Two bullets were recovered from Mrs. Stout's brain while the third had passed through jaw and neck tissue and lodged in the right shoulder. The four small caliber bullets were turned over to police.

The parties stipulated certain facts. The two bullets removed from the head of Norman Stout, and the four bullets from the body of Mary Jane Stout were admitted into evidence. Two stipulations between the parties, signed by the appellant, were admitted into evidence. In addition, it was shown that the 1976 Plymouth automobile stolen by appellant and Wesley (the subject of count four), belonged to Mary Jane Stout while Exhibit "S" a .357 Magnum revolver subject of count five and also stolen during the robbery, belonged to Norman Stout. It was further shown that Norman Edmonds had purchased a Raven .25 caliber automatic pistol and a 9 mm. TA90 automatic pistol in Texas shortly before joining Wesley and driving to Cannonsburg, Pennsylvania, where they met with appellant. Exhibit "N," a .25 caliber ARMI automatic, black in color, was recovered from Clyde Wesley upon his arrest. The 9 mm. pistol and the .357 Magnum pistol

had been sold to John Dino of Cannonsburg, Pennsylvania and recovered from him by police on May 16, 1984, two days after Mr. Stout was shot and left for dead and Mrs. Stout was shot and killed. Appellant introduced Wesley and Norman Edmonds to John Dino to effectuate the sale.

While appellant and Wesley were engaged in the Stout's home, Norman Edmonds, who had remained in the car, decided to leave the scene. He drove on, stopping in nearby New Concord for gasoline. After filling his tank and making a long distance call to his stepfather in Texas, Edmonds drove away from the filling station without paying for the gasoline. Pursued by two young men from the gas station, Edmonds fired several shots from his 9 mm. pistol and frightened his pursuers away. However, they had obtained a description of Edmonds' car and recorded the license number. Edmonds was tracked down and told authorities of the activities of appellant and Wesley. As a result, appellant was taken into custody in Cannonsburg, Pennsylvania while Wesley was arrested in Texas.

Guernsey County Sheriff's Lt. Arnold Van Horn traveled to Cannonsburg to receive the guns recovered from John Dino and to return appellant to Ohio to face prosecution. After full Miranda advise and waiver, appellant gave a statement to Van Horn in the Cannonsburg Police Station. That statement, Exhibit "GG-2," was read into the record. In this first statement, appellant claimed he remained in the car while Wesley and Edmonds went to the Stout's home.

While driving back to Ohio, appellant asked if Mr. Stout had survived. When Van Horn told him that Mr. Stout was alive and would be able to identify the killers, appellant said that when they reached Cambridge, he would like to make another statement because "there were some things he wanted to get straightened out."

In that second statement made after additional Miranda warnings and waiver, appellant admitted his presence in the house, admitted having a gun in hand, admitted robbing the victims and admitted that he shot Mr. Stout. In his second statement, appellant asserted that after shooting Norman Stout, he left with the gun. Appellant agreed that he had the chrome plated .25 caliber pistol but said he also fired Wesley's black .25 caliber automatic. Appellant denied shooting Mrs. Stout.

After recovering the two guns from John Dino, Lt. Van Horn had a further conversation with appellant resulting in appellant's third statement regarding the events of May 14, 1984. In this third statement, appellant claimed that upon entering the Stout's home, he and Wesley exchanged firearms because appellant was unfamiliar with the operation of the chrome-plated .25 caliber Raven. In this third version of the event, appellant claimed he held Wesley's black .25 caliber ARMI throughout the time they were in the Stout's home and only after they returned to the car did he return the black ARMI to Wesley.

Norman Edmonds entered guilty pleas to the shooting incidents in Muskingum County and was to be sentenced to concurrent terms of seven to twenty-five years. He agreed to testify in the trials of appellant and Wesley. Edmonds and Wesley were construction workers in Texas. After their last job was concluded, they decided to drive to Florida to look for work. However, en route, Wesley wished to detour to his hometown, Cannonsburg, Pennsylvania to see his son. As they left Texas, Edmonds had his 9 mm. automatic and a chrome-plated Raven .25 caliber automatic. Exhibit "N-1," a sample chrome Raven .25 was "almost identical" to Edmonds' pistol. Wesley was armed with the .25 caliber ARMI automatic, Exhibit "N."

In Washington, Pennsylvania, Wesley left Edmonds at a motel. Wesley returned the next day and they drove to Cannonsburg where Wesley introduced Edmonds to appellant. After some drinks in a bar in Washington, the three drove into Ohio. Appellant asked Edmonds to show him his .25 caliber chrome Raven pistol. Edmonds did so. Wesley, who was driving, struck a construction barrel and Edmonds took over driving the car. At a later point, Edmonds was told to stop the car. Saying they had to make a phone call, appellant and Wesley got out and walked toward the Stout's home while Edmonds remained in the car.

Thereafter, Edmonds noticed the outside flood lights come on at the Stout's home. The garage door was opened and a car backed out. Edmonds became frightened and drove away. He admitted stopping for gas in New Concord, calling his family in Texas, and leaving without paying for the gasoline. After being chased and firing the 9 mm. pistol, Edmonds turned around and drove back to Washington, Pennsylvania. The next day, appellant and Wesley showed up. Edmonds told Wesley he wanted to return to Texas, offered him his car and expressed the desire to sell his 9 mm. pistol for traveling money. Appellant made a telephone call to arrange the sale of the gun. Thereafter, appellant took Wesley and Edmonds to John Dino's house and introduced them. Dino bought Edmonds' 9 mm. and the .357 Magnum stolen from Mr. Stout. Edmonds and Wesley then drove back to Texas where Edmonds was arrested on the charges filed in Muskingum County. Interviewed by Guernsey County Sheriff's Lieutenant Van Horn, Edmonds told all he knew and agreed to return to Ohio.

Norman Stout survived two gunshots to the head and testified at appellant's hearing below. On the evening of May 14, 1984, Mr. Stout and his wife were seated at their kitchen table. Mrs. Stout was paying bills. Appellant and a second man knocked at the door and asked to use the

telephone, claiming they were travelers and their car had broken own. (Mr. Stout was unable to identify the second man. However, it is undisputed that the second man was Clyde Wesley.) Mr. Stout identified appellant as the one who did most of the talking. Appellant picked up the telephone " . . . and he did something that no one else had ever done. After he finished with the telephone he took his handkerchief and wiped it off." Mr. Stout began cleaning his fingernails with a pocket knife. Appellant asked Wesley, "Are you ready? Are you ready?" Wesley replied, "Not yet." Stumpf questioned Wesley several more times with the same response. Then, as Mr. Stout returned his knife to his pocket, Stumpf again asked, "Are you ready?" Wesley replied, "Now, yes." Both turned, produced pistols and announced a robbery. Mr. Stout's billfold with $117 was taken. Appellant held the victims at gunpoint while Wesley ransacked the house. Mr. and Mrs. Stout were herded down a hall and into bedroom number two. Mr. Stout observed that appellant and Wesley operated as a well co-ordinated team. Appellant continued to hold both victims at gunpoint in bedroom two. Mr. Stout noticed that appellant's gun hand was wavering and Stout started to walk around the end of the bed. When Mr. Stout reached the end of the bed, appellant shot him between the eyes with the chrome-plated .25 caliber automatic pistol. Stout grappled with appellant, pushing him across the hall into bedroom number one. Mr. Stout was unable to recall being shot the second time in the top of the head. As he regained consciousness he found himself lying on the floor of bedroom number one and heard two male voices conversing in a normal tone of voice. Within a minute Mr. Stout heard the four gunshots which killed his wife. His next recollection was in the ambulance on the way to the hospital.

Stout was positive in his identification of appellant as the gunman with the chrome-plated .25 automatic. He identified the sample Raven .25 as being very similar to that

carried by appellant. Wesley's black ARMI .25 was not the type of gun used to shoot him.

Rondal Dye, firearms and tool mark examiner from the Ohio Bureau of Criminal Identification and Investigation examined the guns, the various spent shell casings from the scene, the bullets removed from Mr. Stout's head and the bullets removed from Mrs. Stout's body. The four bullets removed from Mary Jane Stout's body and the bullet from the wound to the top of Norman Stout's head were all fired from the same .25 caliber firearm. While Exhibit "G" (the bullet from the nasal wound to Mr. Stout) was too small a fragment to compare, it did have the same width rifling as found on "AA" and "F." All remaining characteristics of Exhibit "G" were consistent with having been fired from the same gun which fired the five bullets in Exhibits "AA" and "F." Of the eight spent .25 shell casings recovered from the bedrooms and hallway, seven were fired from one weapon. One was fired from the second gun, Wesley's black ARMI .25. Exhibit "I," the bullet recovered from the wall in bedroom two was fired by the same weapon which fired the bullets recovered from Mr. Stout's head and from Mrs. Stout's body, Exhibits "AA" and "F." Exhibit "J," a bullet recovered from the mattress in bedroom one where Norman Stout was found, was fired by Wesley's black ARMI .25 caliber pistol. Exhibit "T," Edmonds' 9 mm. automatic pistol could not have fired any of the bullets in question. Exhibit "E," a fired bullet (recovered from the floor of bedroom number one where Norman Stout was found), was fired by the same weapon which fired Exhibits "A" and "F," bullets recovered from both victims. Wesley's black ARMI .25 pistol was tested for rapid fire

capability. Dye found that the ammunition clip would not seat properly and, therefore, the pistol would jam, or malfunction. On at least one occasion, it jammed after just one shot.

In mitigation, appellant presented evidence that although he dropped out of school in the ninth grade, he worked to his capacity during the fifth and sixth grades. Although appellant had some prior contact with the courts, he lacked a significant history of convictions or juvenile adjudications. Various family members and friends were of the opinion that appellant did not display a violent temper, helped people, respected women, worked hard, and was not a person who displayed significant leadership qualities.

Appellant declined to be sworn, but made an unsworn statement on his own behalf explaining his version of the events. In his statement, appellant admitted he went to the Stout's home armed with a pistol; claimed Wesley was the one who actually touched the telephone and wiped off his fingerprints; agreed they pulled guns and that he announced the robbery. Appellant asserted he was frightened and nervous; that Mr. Stout lunged at him and "the gun went off." He agreed Mr. Stout showed him into bedroom number one. At that point, appellant claimed that Wesley was also present and Mr. Stout, although shot in the head, was able to knock the guns from both appellant's hand and Wesley's hand. Appellant claimed that Wesley said "shoot him"; that appellant looked down and saw Wesley's black ARMI .25. Appellant stated, "I picked Dan's gun up and I fired and then at that time Mr. Stout fell on the floor, rolled off the bed onto the floor." Appellant admitted speaking with Wesley, but only to state he was fleeing. He claimed he went to the basement, backed the car out of the garage and was joined by Wesley. He said he was sorry for his acts.

The appellant lists his mitigating factor evidence as follows: During the mitigation phase of the proceedings, the

defendant presented fifteen witnesses and six exhibits. The witnesses who testified in behalf of the defendant, came from various backgrounds and were both male and female. Their ages ranged from twenty to sixty years of age. The evidence elicited form those individuals established the following facts concerning the defendant.

1. The defendant came from a close family and resided at home with his mother, step-father, and younger sister.

2. John went only until the ninth grade of high school, and during his early years of school, he engaged in the normal activities of a child of his age.

3. Two of John's grade school teachers testified that, while he was not academically inclined, he tried very hard and worked up to his ability, which was consistent with his I.Q. of 78 to 87.

4. The teachers both testified that John's interaction with others was good and that he was not a problem student.

5. One of the teachers, Annette Walls, had experience for seven years teaching juvenile delinquents, and she testified concerning John's positive attitude and that he was not a discipline problem. Both teachers agree upon John's positive response when he was reprimanded and the fact that he acknowledged when he was wrong.

6. Several factors were heard repeatedly from most of the witnesses who testified. One of these factors was that John was not possessed of a temper and none of them had ever seen an outburst of a temper from John.

7. Another factor to be considered in the context of this offense again brought a consensus of opinion and that was the lack of leadership qualities that John possessed. Without

exception, the witnesses agreed that John was not a leader and was one of those individuals who would follow along with others.

8. Evidence was elicited that John never engaged in fighting or violent acts and was an individual who had the utmost respect for women.

9. John was an individual who was always working and when he did work, he did more than was expected of him.

10. John was an individual who went out of his way to help others and was one of those individuals who got along with everyone. John was trusted to watch the infant children of friends and relatives, and extended help on numerous occasions to an elderly friend who suffered from a heart condition.

11. John was a compassionate individual which was evidenced by the account of one witness concerning John's accompanying the father of a friend who had been killed in a motorcycle accident. His presence on that occasion was to offer moral support to the family.

12. John did not like guns and never possessed them and on the one occasion that he did go deer hunting with friends, he expressed his distastes for it.

13. One witness testified that the co-defendant, Dan Wesley, was the leader of the two.

14. Witnesses who were closest to John testified that they had never seen anything in his history and background which would indicate that John had a tendency toward the acts to which he had entered a plea of guilty.

The witnesses from whom this testimony was elicited included his mother, one sister, two teachers, and nine friends. The term "friends" does not consist of individuals close to the age of the defendant but includes a number of older adults. Also offered during the mitigation phase were exhibits consisting of the indictment against the co-defendant, Clyde Daniel Wesley, the Bill of Information and plea proceedings of Norman Edmonds, school records of John Stumpf, a social history of John Stumpf, and a summary of questionnaires completed by residents of the Cannonsburg, Pennsylvania, area. Also submitted were the original questionnaires upon which the summary was based. While the validity and relevancy of the questionnaires was placed in issue, the court did allow them to be submitted. The questionnaires were the result of more than sixty interviews with individuals from that community and were occasioned by the fact that the distance of Cannonsburg, Pennsylvania, resulted in the procedure being used.

In the original brief in direct appeal in Case No. 760, appellant assigns ten errors in form:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN FINDING THAT THE ONE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENDANT. THE PROCEDURE FOLLOWED BY THE COURT WAS CONTRARY TO LAW. THE FINDING WAS CONTRARY TO THE EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2.

THE DEATH SENTENCE IS DISPROPORTIONATE TO THAT IMPOSED IN SIMILAR CASES, AND THEREFORE VIOLATIVE OF THE STATE AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN REQUIRING EVIDENCE OFFERED IN MITIGATION TO BE PROVED BY A PREPONDERANCE. SUCH A REQUIREMENT DEPRIVED THE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN ITS JUDGMENT AND SENTENCE BY FAILING TO COMPLY WITH SECTION 2929.03(F) OF THE OHIO REVISED CODE.

ASSIGNMENT OF ERROR NO. 5

UPON AN INDEPENDENT WEIGHING, IT IS APPARENT THAT THE SINGLE AGGRAVATING CIRCUMSTANCE THE DEFENDANT WAS FOUND GUILTY OF COMMITTING DOES NOT OUTWEIGH THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT, AND THEREFORE, THE DEATH SENTENCE CANNOT BE AFFIRMED, PURSUANT TO REVISED CODE SECTION 2929.05(A).

ASSIGNMENT OF ERROR NO. 6

DEATH IS NOT THE APPROPRIATE SENTENCE IN THIS CASE. THEREFORE, PURSUANT TO REVISED CODE SECTION 2929.05(A), AND REVISED CODE SECTION 2929.06, AND THE STATE AND FEDERAL CONSTITUTIONS, THIS DEATH SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A RE-SENTENCING HEARING TO DETERMINE WHICH LIFE TERM WILL BE IMPOSED.

ASSIGNMENT OF ERROR NO. 7

THE DEATH PENALTY IMPOSED UPON THE DEFENDANT, AND THE STATUTES AUTHORIZING IT, IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS TWO, NINE, TEN AND SIXTEEN, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 8

OHIO REVISED CODE, SECTIONS 2929.03 AND 2929.04, AS APPLIED TO THE DEFENDANT, VIOLATE UNITED STATES CONSTITUTION, AMENDMENT VIII AND OHIO CONSTITUTION ARTICLE I, SECTION 9, PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

ASSIGNMENT OF ERROR NO. 9

THE DEATH PENALTY IMPOSED UPON THIS DEFENDANT UNDER SECTIONS 2929.02, 2929.022, 2929.03 AND 2929.04 OF THE REVISED CODE OF OHIO VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTION 2929.04(A) IS OVERBROAD AND VAGUE.

ASSIGNMENT OF ERROR NO. 10

THE MITIGATING CIRCUMSTANCES IN SECTION 2929.04(B) OF THE REVISED CODE OF OHIO ARE IMPERMISSIBLY VAGUE.

By leave of court a supplemental assignment of error was filed alleging abuse of discretion in the trial court's failure to allow withdrawal of the plea of guilty and to vacate the sentence.

The matters relating to the Wesley trial and jury mercy verdict for Wesley are also "feathered into" the second assigned error in the original brief. It also challenges the trial court's capacity to adjudicate those motions to withdraw guilty plea and vacate judgment upon the ground that one member of the three judge panel died after entry of judgment of death sentence and only the remaining two acted upon the motions.

The separate appeal Case No. 793 reasserts essentially the same assignment of error in this form:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SET ASIDE PLEA OF GUILTY AND IN THE ALTERNATIVE TO CONDUCT A NEW SENTENCING HEARING. THE COURT LACKED JURISDICTION IN DETERMINING THE DEFENDANT'S MOTION.

We overrule all assigned errors for the reasons hereafter set forth in our serial considerations thereof.

1

We find no error or law in the trial court's handling of the comparison of the aggravating circumstances and the weighing of the mitigating factors against them.

The trial court filed a detailed statement of its reasons why the former outweighed the latter. The mere fact that a mitigating factor exists is not conclusive. What weight shall be given it is for the trier of fact even where the the fact of its existence is undisputed.

By appellant's guilty plea he admitted he was a principal offender. His plea to the specification effectively admitted that he killed the victim to silence her as a witness to the robbery, so as to escape detention and punishment. As a matter of law the intentional killing of a witness is entitled to great weight in a court of justice. Certainly no legal error in respect thereto exists relative to the weight assigned it on this record.

2

It is an undisputed fact that the death sentence for appellant is not the same as the mercy verdict for separately

tried Clyde Wesley. On the law side we reject the claim that this precludes the execution of Stumpf. The record contains facts justifying the death penalty for Stumpf and authorizing the conclusion that mercy for Wesley was not by the prosecutor's consent but an aberration of the jury that tried Wesley.

3

There is no error in placing the burden of persuasion upon the defendant as to mitigating factors. *State v. Jenkins* (1984), 15 Ohio St.3d 164 at 171.

4

This is a repeat of the first assigned error. The weight to be assigned to mitigating factors is for the trier of fact as is the relative weight to be assigned the aggravating circumstance. It is difficult to imagine what could, as a matter of law, outweigh as an aggravating circumstance in a court of justice the assassination of a witness to a crime.

5

This assignment of error fuses the law call with our independent duty to review and independently weigh all the facts and other evidence. R.C. 2929.05.

There were two aggravating circumstances. The first was essentially the assassination of a witness to escape detection and punishment and the second that he was armed with a firearm.

It is our independent judgment that the intentional killing of a witness is an aggravating circumstance we which we elect to assign the greatest possible weight because of the relationship it bears to the to the preservation of liberty under

law and that is our reason why, beyond a reasonable doubt, it outweighs all fourteen of the appellant's enumerated mitigating factors, including therein that Wesley later received a mercy verdict.

6

This assigned error actually addressed the law side of whether the trial court properly conducted its "weighing task" and filed the essential statement of reasons. It did. the document is lengthy, detailed and carefully handled. We find no error therein.

7, 8, 9, and 10

The seventh, eighth, ninth and tenth assignments of error are the obligatory multifacted attack upon the constitutionality of the death penalty generally and the Ohio Statutes particularly. They are each overruled upon the authority of *State v. Jenkins* (1984), 15 Ohio St.3d 164, and *State v. Maurer* (1984), 15 Ohio St.3d 242.

11

The separate assignment of error going to the motion to withdraw the guilty plea and vacate the conviction are both based upon the fact that appellant's cohort Wesley bragged (perhaps exaggeratedly, perhaps not) about his direct detailed participation in the slaying of Mary Jane Stout and the subsequent separate trial failure of the state to get a death verdict from Wesley's jury. We are compelled to characterize this as nothing more than an underserved lucky "bounce of the ball" for Wesley. The proposition that this aberration automatically precludes the death penalty for Stumpf is one to which we do not subscribe. The evidence before us shows the kind of crime for which the death penalty is manifestly appropriate. If Wesley deserved mercy upon the facts of his

case, that was for the jury. Mercy for Wesley deserved or undeserved is not, in our opinion, conclusive upon the trial court or us as a matter of law or upon as de novo in this case under R.C. 2929.05.

Moving now to the fact of the death of one member of the Common Pleas panel post judgment, R.C. 2945.06 plainly provides for a majority of the panel to decide questions of law.

As to the question of the motion to withdraw the plea, we find no evidentiary basis for relieving the accused of his plea. Nothing that qualifies as newly discovered evidence exists in this record.

We are not disturbed that the state tried Clyde Wesley as a principal executioner of the potential witness Mary Jane Stout after it had already secured a death penalty against Stumpf for the same intentional killing. The evidence beyond reasonable doubt shows Stumpf was at least one of her principal slayers.

The entire fallacy of appellant's position as we see it is that it depends upon the proposition that the law limits to one the number of people who may directly factually participate in a slaying. If twenty persons on a side intentionally and fatally "tug of war" as under another person is only one of them exposed to the hazard of a death penalty?

In our opinion, the evidence in this case shows Stumpf directly and personally participated in the actual slaying. The fact that another participant was spared the death penalty does not, in our opinion, preclude the death penalty as to him.

Stretched to its logical conclusion, appellant's concept means that if one person gets mercy for a horrible crime, thereafter the death penalty is precluded for all others who

commit the same kind of crime. In other words, one mercy verdict in any one county and the entire death penalty statute is effectively repealed. Stated otherwise, "If you lose one, you have lost them all."

This crime is worse than that in *State v. Williams* (1986), 23 Ohio St.3d 16, where the death penalty was affirmed by the Ohio Supreme Court March 26, 1986.

FINDINGS

Having complied with App.R. 12 respecting the assignments of error, we move to a discharge of our responsibility under R.C. 2929.05. In that connection, we make the following certifications:

We have reviewed and independently weighed all of the facts and other evidence disclosed in the record in this case, and we have considered the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case and whether the sentence of death is appropriate. In so doing, we have considered whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. We conclude beyond a reasonable doubt that the death sentence is appropriate in this case and that is neither excessive nor disproportionate to the penalty imposed in similar cases. We have also reviewed all the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances. First, that he pled guilty to the charge that he killed Mary Jane Stout purposely and for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by him, to wit, aggravated robbery and attempted aggravated murder and also to the separate specification that while so doing he had a firearm on or about his person or under his control while committing that offense.

We conclude that the sentencing court properly weighed the aggravating circumstances that the offender was found guilty upon his plea of guilty of committing and the mitigating factors that the accused proved.

In addition to our traditional responsibility to review the judgments and orders of the Guernsey County Common Pleas Court, we are required by R.C. 2929.05 independently to examine two additional questions:

> (1) Do the fact and evidence in the record satisfy us that the aggravating circumstances of which Stumpf was found guilty outweigh the mitigating factors? and,
>
> (2) Is the sentence of death appropriate?

We must be independently persuaded that the answer to both of these questions is "yes" to affirm the death sentence. R.C. 2929.05(A).

The appropriateness of the death penalty has both a constitutional and statutory dimension.

Constitutional Dimension. The Eighth and Fourteenth Amendments to the U.S. Constitution, as interpreted by the U.S. Supreme Court, require us to examine whether, upon the facts and circumstances of this case, the imposition of the death penalty would amount to "cruel and unusual punishment." The death penalty is cruel and unusual if "excessive," *Gregg v. Georgia* (1976), 428 U.S. 153, 173, or is arbitrarily or capriciously imposed, *Furman v. Georgia* (1972), 408 U.S. 238 (per curiam). See *Gregg*, supra, at 189 ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that

discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.")

Consideration of what penalties have been imposed in similar cases—comparative proportionality review—is not required by the Constitution. *Pulley v. Harris* (1984), 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29. See, also, *Shaw v. Martin*, (4th Cir. 1984), 733 F.2d 304 (although comparative proportionality review may be a safeguard against arbitrarily imposed death sentence, it is not constitutionally required).

Statutory Dimension. As pointed out by Judge Wise in his dissent, Ohio has selected, notwithstanding Pulley, to make proportionality review an indispensable ingredient in the process of determining whether the death sentence is appropriate.

> In determining whether the sentence of death is appropriate, the court of appeal and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.
>
> 2929.05(A).

Our proportionality review necessarily draws a new factual ingredient into this particular case. A co-defendant, Wesley, was tried and convicted as a principal in the same crime after sentence was pronounced by the common pleas court in the Stumpf case. Wesley has been since sentenced to life imprisonment. The impact proportionality can have upon Eighth and Fourteenth Amendment questions is well pointed out in *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140. In *Enmund*, the defendant and a co-defendant were found guilty of the murder and robbery of two elderly persons at their farmhouse. They were sentenced to death. Enmund, convicted as a principal, remained in the car, waiting to help those who went into the farmhouse and killed

in their escape. The Court concluded that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, intend to kill, or contemplate that life would be taken.

It is within this framework that we undertake our independent examination of the facts and other evidence in this case and address the two critical questions:

> DO THE FACTS AND EVIDENCE IN THE RECORD SATISFY US THAT THE AGGRAVATING CIRCUMSTANCES OF WHICH DEFENDANT WAS FOUND GUILTY OUTWEIGH THE MITIGATING FACTORS?

We independently find that the aggravating circumstances to which the offender plead guilty are that he killed Mary Jane Stout purposely for the purpose of escaping apprehension and punishment as above stated and also while armed with a firearm.

We further find, after taking into consideration the nature and circumstances of the offense, the history, the character and background of the offender, and all of the factors specified in R.C. 2929.04(B), that the aggravating circumstances beyond a reasonable doubt outweigh all the mitigating factors in this case. In this connection, we state that we have considered the fact that Wesley received mercy, plus all fourteen of the mitigating factors claimed by the accused, including but not limited to: (1) evidence of character; (2) use of alcohol and drugs; (3) employment history; (4) emotional stability; (5) family relationships; (6) educational background and native intelligence (see defendant's mitigation Exhibit "3"); (7) unverified and unattested questionnaires on John David Stumpf (see defendant's mitigation Exhibit "6"); (8)

summary results of questionnaires (see defendant's mitigation Exhibit "5"); and (9) leadership qualities. We are aware that the offender was 23 years of age and has a low I.Q. and no significant criminal record.

Moving now to our statutory duty to state the reasons why we find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, we state that the aggravating circumstance of intentionally killing an innocent, stranger witness-victim of crime so as to prevent detection and punishment is a direct assault of great magnitude and weight upon the integrity of the justice system and the foundations of liberty. The weight of that aggravating circumstance, coupled with the use of a firearm, outweighs all of the mitigating factors shown in this case, including but not limited to a showing that the offender is 23 years of age, has a low I.Q., is without a significant prior criminal history, and is remorseful. Those are our reasons.

Upon the question of the impact of the fact that a fellow participant in the guilty conduct subsequently received a mercy verdict in a separate trial to a jury, it is our opinion that this does not as a matter of law preclude the death penalty for Stumpf.

IS THE SENTENCE OF DEATH APPROPRIATE?

This was an awful, vicious murder. The victim and her husband were innocent, peaceful, even helpful, strangers. They were treated inhumanely and with utter disregard of their right to dignity, not to mention the right to live peaceably in their own home. They invited no intrusion into their privacy. They courted no assault. They suffered savage assaults.

We agree with the dissent that Stumpf and Wesley "both deserve the electric chair."

What, then, is the impact of the fact—injected into this case for the first time on appeal—that the offender, Wesley, was also found guilty, after trial by jury, of the same offense, and was, in the sentencing hearing, given a life sentence?

We find the evidence supports the conclusion that it was Stumpf, not Wesley, who pulled the trigger that propelled the four bullets into the body of the victim.

Having so found, we conclude that the death sentence is neither excessive, disproportionate, nor cruel and unusual. Stumpf did kill within the purview of *Enmund, supra*.

Under these findings and this state of the case, we find no disproportion in the death sentence here as contradistinguished from the life sentence in the case of Wesley.

However, it is not essential that we find Stumpf to be the killer in fact to conclude that the death sentence as to him is not disproportionate. The statutory concept of "proportionality" goes generally to the question whether this is the sort of crime for which the death penalty is appropriate; it does not mean specifically that no joint principal actor may be executed unless all are. Stated conversely, if Wesley showed his jury grounds for mercy for him, that distinguished from Stumpf.

Many of the factors in Wesley's case bearing upon mitigation and appropriateness of the death penalty as to him, are necessarily irrelevant as to Stumpf. (Thus, for example, it is conceivable that two offenders could together hold the gun and jointly pull the trigger. For one life sentence might be appropriate and not disproportionate; that is, the mitigating factors for the former outweigh the aggravating circumstances; or his age or health might make death an

inappropriate sentence.) See *United States v. Barnes* (2d Cir. 1979), 604 F.2d 121, *cert. denied* (1980), 446 U.S. 907 (however desirable some standards may be to avoid gross disparities in sentencing, because of the many variables attached to each case, it will always remain the fact that each situation requires its own special treatment); *Phillips v. Gathright* (W.D. Va. 1979), 468 F. Supp. 1211, 1212, *aff'd without opinion* (1979), 603 F.2d 219 (punishment is not arbitrary simply because others escape punishment for the same, equal or even worse behavior).

We find no decisions by the United States Supreme Court dealing with the proportionality issue as presented in the instant case, i.e., comparing the sentences of co-defendants for the same crime arising from the same activity. The Court, however, has decided recently to review two capital punishment cases where this kind of proportionality analysis may be required. See *Tison v. Arizona* (1984), 142 Ariz. 446, 690 P.2d 747 (*en banc*); 142 Ariz. 454, 690 P.2d 755 (*en banc*), *cert. granted* (1986), 89 L.Ed.2d 299 (whether the death penalty, for a murder committed in the course of a prison escape, may be imposed on a person who participated in the escape, but who did not kill or attempt to kill anyone).

For the foregoing reasons, all the assigned errors, eleven in number, in the direct appeal in Case No. 760 are overruled and the assignment of error in all three of its aspects in Case No. 793, relating to the motion to withdraw the guilty plea, are overruled, the judgment of the Court of Common Pleas of Guernsey County is affirmed, and this cause is remanded to that court for execution of sentence.

JOURNAL ENTRY OF JUDGMENT

This document is an announcement of decision. See Ohio App.R. 26.

This document is the judgment entry may pursuant to the third sentence of Ohio App.R. 22(B).

CLERK TO REFILE

Ten days from the date hereof this document will be file-stamped to indicate journalization, at which time it will become the journal entry of judgment and order of the court and the time period for review shall begin to run. App. R. 22(E).

MANDATE

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

CERTIFY COPY TO SUPREME COURT

A certified copy of this document shall constitute the separate opinion as to the findings of the court in this case within the meaning of R.C. 2929.05(A) and the clerk of this court shall immediately make and file such certified copy with the clerk of the Supreme Court of Ohio. See the last paragraph of R.C. 2929.05(A).

CONCUR BY: WISE (In Part)

DISSENT BY: WISE (In Part)

DISSENT: WISE, J. CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's opinion in overruling all assigned errors as to the appellant's direct appeal. However, R.C. 2929.05 requires each member of this court to conduct a de novo determination as to "whether the sentence of death is appropriate." If that were the sum total of the statutory language as to the duty imposed upon us, I would certainly joint the majority in holding that the death penalty in-this case is appropriate. I do so believe. However, the Ohio statute mandates further that:

> In determining whether the sentence of death is appropriate, the court of appeals . . . shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. (Emphasis added.)

I view this language as adding an additional mandatory burden upon each judge not only to determine whether the death penalty is appropriate under the facts of the case, but further whether it is appropriate in light of the sentence given, at least, to other participants in the commission of the same crime. I am fully aware that under *Pulley v. Harris* (1984), 465 U.S. 37, 79 L.Ed.2d 29, the United States Constitution does not require a state appellate court, before affirming a death sentence, to compare the sentence in the case before it with the sentence imposed in similar cases simply because the defendant requests it. However, under R.C. 2929.05, the clear mandate of the legislature is that we individually shall do so. The case at bar clearly poses the issue of sentence "in similar cases." Wesley and appellant were both found guilty of the same crimes. The fact of who pulled the trigger in the case at bar does not make the death sentence any more or less appropriate. They both deserve the death penalty. The cases of appellant and Wesley are similar in every aspect except that the appellant came forward, did not fight extradition, made statements implicating himself, and pled guilty; Wesley fled,

fought extradition and pled not guilty and stood trial to a jury. Appellant received the death penalty; Wesley received a mercy sentence. I cannot sanction the electric chair for the appellant since it would be excessive and disproportionate to the penalty imposed in the similar case of Wesley. My decision in this case is compelled by statutory enactment and not personal choice.

I therefore respectfully dissent from the majority holding as to the penalty to be imposed on appellant.

APPENDIX K

IN THE COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

STATE OF OHIO

Plaintiff CASE NO. 9684

-vs-

JOHN DAVID STUMPF JUDGMENT ENTRY

Defendant

This matter came on for hearing in accordance with Section 2945.06 of The Revised Code of Ohio, the Defendant heretofore having waived a trial by jury and having requested a trial to a panel of three judges. Thereafter, the Defendant entered a plea of guilty to Count One of the Indictment and Specification One as amended to Count One and Specification Four, to Count One. The Defendant further entered a plea of guilty to Count Two of the Indictment and the Specification to Count Two.

The Court in accordance with Section 2945.06 of the Revised Code of Ohio heard the testimony of the witnesses and determines that the Defendant is guilty beyond a reasonable doubt as charged in Count One of the Indictment and is guilty beyond a reasonable doubt of Specification One as amended to Count One and Specification Four to Count One.

The Court further determines that the Defendant is guilty beyond a reasonable doubt as charged in Count Two of

the Indictment and guilty beyond a reasonable doubt of the Specification to Count Two as set forth in the Indictment.

/s/JOHN E. HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WAREN BETTIS, JUDGE

APPENDIX L

IN THE COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 9684
	:	
-vs-	:	SEPARATE OPINION
	:	REQUIRED BY SECTION
JOHN DAVID STUMPF,	:	2929.03, THE REVISED
	:	CODE OF OHIO
Defendant.	:	

Pursuant to Section 2929.03 F of the Revised Code of Ohio, the Court being a panel of three judges does hereby state in a Separate Opinion as follows:

A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

1. The nature and circumstances of the offense.

2. The history, character and background of the offender. (See Defendants Mitigation Exhibit No. 4)

We find that the Defendant has established by a preponderance of the evidence the following mitigating factors:

1. The youth of the offender - age 23.

2. That although the Defendant had been found guilty of certain offenses in his home community, the Defendant lacked significant history of prior criminal conviction and delinquency adjudications.

We further find that the Defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04 B.

B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

The Defendant presented the following factors which the Court has considered:

1. Evidence of character.

2. Use of alcohol and drugs.

3. Employment history.

4. Emotional stability.

5. Family relationships.

6. Educational background and native intelligence. (See Defendant's Mitigation Exhibit No. 3)

7. Unverified and unattested questionnaires on John David Stumpf. (See Defendant's Mitigation Exhibit No. 6). The alleged preparer's name appears in response to Question No. 30 with no indication it is or is intended as a signature. The questionnaries were prepared by person or persons unknown.

8. Summary results of questionnaires. (See Defendant's Mitigation. Exhibit No. 5)

9. Leadership qualities.

Factors 1 through 9 were not established as mitigating factors by a preponderance of the evidence.

C. AGGRAVATING CIRCUMSTANCES THE DEFENDANT WAS FOUND GUILTY OF COMMITTING.

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the Defendant, to-wit: Aggravated Robbery and Attempted Aggravated Murder.

D. REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS:

1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

   a. Wiping of fingerprints from the telephone.

   b. The dialogue of the Defendant with his companion. (See attached Transcript A)

c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

d. Continual holding both victims at gunpoint by the Defendant.

e. The Defendant shooting the male victim at close range between the eyes.

f. The Defendant firing a second shot into the head of the male victim.

g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

3. Failure of the Defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

6. The Course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The Defendant's companion firing a gun into a passing vehicle in route.

8. The Defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault and other crimes.

September 24, 1984 /s/JOHN E. HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WARREN BETTIS, JUDGE

APPENDIX M

IN THE COURT OF COMMON PLEAS

GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	CASE NUMBER 9684
PLAINTIFF,	:	JUDGMENT ENTRY
v.	:	
JOHN DAVID STUMPF,	:	
DEFENDANT.	:	

This matter came on for trial upon regular assignment this 17th day of September, 1984, before a three judge panel consisting of the Honorable John E. Henderson of this Court, the Honorable J. Warren Bettis, Judge of the Court of Common Pleas, Columbiana County, Ohio, by assignment of the Ohio Supreme Court, and the Honorable Raymond Rice, Judge (retired) of the Court of Common Pleas, Tuscarawas County, Ohio, by assignment of the Ohio Supreme Court, with the Honorable John E. Henderson presiding, the Defendant having heretofore on the 23rd day of August, 1984, properly waived in writing and in open court with the advice and assistance of counsel his right to trial by jury in this cause and his election to be tried by a three-judge panel.

The Defendant appeared in open court represented by his court-appointed counsel, Attorneys Lewis M. Tingle and Craig M. Stephens, and the State of Ohio represented by the Prosecuting Attorney, James R. Scott, and Assistant Prosecuting Attorney, C. Keith Plummer.

Whereupon, the Prosecuting Attorney informed the Court that a negotiated plea had been concluded, subject to the approval of the court, and stated in open court and on the record the underlying agreement regarding the plea bargain, the same being subject to the provisions of Rule 11(C)(3), Ohio Rules of Criminal Procedure and Ohio Revised Code, Section 2945.06, with respect to the charge contained in the First count in the Indictment, to wit: the offense of "AGGRAVATED MURDER" with specifications of aggravating circumstances.

Counsel for the Defendant, and the Defendant personally, upon inquiry by the Court confirmed that the Prosecuting Attorney had fully, accurately and correctly stated the terms of the plea bargain.

In accord with the terms of the plea bargain, and upon oral motion by the Prosecuting Attorney pursuant to the provisions of Rule 7(D), Ohio Rules of Criminal Procedure and the provisions of Ohio Revised Code, Section 2941.30, leave was granted for the Prosecuting Attorney to amend Specification One to the First Count set forth in the Indictment in this cause by substituting the words "other offenses" for the words "another offense" and by adding at the end of said Specification One, the language "and 'ATTEMPTED AGGRAVATED MURDER'", and the Prosecuting Attorney thereupon amended said Specification One to the First Count accordingly, by interlineation, all without objection by the Defendant.

Upon inquiry by the Court, counsel for the Defendant informed the Court that they have fully investigated the facts and law in this case and have informed the Defendant of all defenses available to him, and have further informed the Defendant of the nature of the offense of "AGGRAVATED MURDER" as charged in the First Count, together with the Specification One, as amended, and Specification Four to said

First Count, and the nature of the offense of "ATTEMPTED AGGRAVATED MURDER" as charged in the Second Count, together with the Specification to said Second Count, and the penalties for said offenses, and that they had further informed the Defendant of all of his constitutional rights under both the Ohio Constitution and the United States Constitution.

Whereupon, after being advised of his privilege against self-incrimination by the Court, the Defendant, personally, waived said privilege and was duly sworn and answered inquiries by the Court and the Court being satisfied therefrom that the Defendant has been fully advised of all of his constitutional rights, including the nature of the aforesaid offenses charged in the First Count and Second Count in the Indictment and the aforesaid Specifications to said counts, and the possible penalties thereunder, and that the Defendant is fully aware of the consequences of entering a plea of "GUILTY" to said First Count, including Specification One, as amended, and Specification Four to said First Count, and a plea of "GUILTY" to said Second Count and the Specification thereto, including such of his constitutional rights as will be waived by entering such pleas of "GUILTY" and that the proposed pleas of "GUILTY" thereto is voluntarily, knowledgeably and intelligently tendered by the Defendant without any threats or promises having been made to the Defendant to induce such pleas of "GUILTY" other than the terms of the plea bargain as entered into the record and affirmatively acknowledged by the Defendant upon the record. Whereupon, the Defendant, personally, withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the offense of "AGGRAVATED MURDER" in violation of Ohio Revised Code, Section 2903.01(B) as charged in the First Count of the Indictment and withdrew his former plea of "NOT GUILTY" and entered pleas of "GUILTY" to Specification One, as amended, and Specification Four, to said First Count, and the Defendant

further withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the offense of "ATTEMPTED AGGRAVATED MURDER" in violation of Ohio Revised Code, Section 2923,02(A) (Felony in the First Degree) and withdrew his former plea of "NOT GUILTY" and entered a plea of "GUILTY" to the Specification to said Second Count.

The Court finds that the aforesaid pleas of "GUILTY" by the Defendant were made freely, voluntarily and understandingly with full knowledge of the nature of the accusations against him and the consequence of entering said pleas and without any threats, undue influence, compulsion, coercion, promises of leniency or other promises of any kind except as set forth in the aforesaid plea bargain entered into the record and affirmatively acknowledged on the record by the Defendant.

It is, accordingly, ORDERED AND ADJUDGED that the aforesaid plea of "GUILTY" be and hereby are accepted and made a part of the record in this cause this 17th day of September, 1984, and it is further

ORDERED AND ADJUDGED, that an evidentiary hearing be had in this cause pursuant to Ohio Revised Code, Section 2945.06, and pursuant to Rule 11(C)(3), Ohio Rules of Criminal Procedure, commencing at 9:00 o'clock A.M. on the 18th day of September, 1984, with respect to the offense of "AGGRAVATED MURDER" as set forth in the First Count in the Indictment and with respect to Specification One, as amended, and Specification Four to said First Count, and it is further

ORDERED AND ADJUDGED, that the matter of the adjudication of guilt and the imposition of sentence with respect to the offense of "ATTEMPTED AGGRAVATED MURDER" as set forth in the Second Count In the Indictment and the Specification to said Second Count be and hereby are

deferred pending completion of the aforesaid evidentiary hearing and further proceedings according to law with respect to said First Count and Specification One, as amended, and Specification Four to said First Count.

/s/JOHN E HENDERSON, JUDGE
/s/RAYMOND C. RICE, JUDGE
/s/J. WARREN BETTIS, JUDGE

APPROVED:
/s/JAMES R. SCOTT, PROSECUTING ATTORNEY
COUNSEL FOR PLAINTIFF
/s/LEWIS M. TINGLE
CO-COUNSEL FOR DEFENDANT
/s/CRAIG M. STEPHENS
CO-COUNSEL FOR DEFENDANT

APPENDIX N

Court of Appeals of Ohio
Fifth Appellate District
Guernsey County

Case No. 89-CA-50

STATE OF OHIO, Plaintiff-Appellee,
v.
JOHN DAVID STUMPF, Defendant-Appellant,

Appellant from Common Pleas Court, Case No. 9684.

July 23, 1990

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is affirmed.

JUDGES: Hon. Norman J. Putman, P.J., Hon. Irene B. Smart, J., Hon. W. Scott Gwin, J., concur.

COUNSEL: For Plaintiff-Appellee, C. KEITH PLUMMER, PROSECUTING ATTORNEY, Cambridge, Ohio. For Defendant-Appellant, DAVID L. DOUGHTEN, Cleveland, Ohio.

OPINION BY: GWIN

OPINION

Defendant-appellant, John David Stumpf (appellant), appeals from the judgment of the Court of Common Pleas of Guernsey County granting summary judgment in favor of the

State of Ohio thereby dismissing appellant's petition for post-conviction relief under R.C. 2953.21, which judgment is attached as an Appendix to this opinion. Appellant now seeks our review and assigns the following as error:

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RENDERED THE APPELLANT'S WAIVER OF A JURY TRIAL INVALID IN CONTRAVENTION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED IN FINDING THE APPELLANT'S PLEA OF GUILT TO BE A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHT TO TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III. THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENSE COUNSEL IMPROPERLY INDUCED APPELLANT'S PLEA, AND THEREBY DEPRIVED THE APPELLANT OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS PROTECTED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE MITIGATION PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH

AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ART. I SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

V. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI. THE TRIAL COURT ERRED IN SUMMARILY DISMISSING APPELLANT STUMPF'S POST CONVICTION PETITION WITHOUT ACCORDING HIM AN EVIDENTIARY HEARING.

I

In his first assignment, appellant claims that his waiver of a jury trial is invalid because of ineffective assistance of counsel. The standard two-pronged test by which we are guided in the base sub judice for determining whether there has been ineffective assistance of counsel is:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington (1984), 466 U.S. 668, 687.

The above test is in substance the test for determining effective assistance of counsel under the Ohio Constitution. See *State v. Lytle* (1976), 48 Ohio St. 2d 391, 195, vacated in

part on other grounds (1978), 438 U.S. 910; *State v. Brooks* (1986), 25 Ohio St. 3d 144, 147; *State v. Post* (1987), 32 Ohio St. 3d 380, 388.

In *State v. Decker* (1986), 28 Ohio St. 3d 137, 140, the Ohio Supreme Court summarized certain relevant portions of the *Strickland*, supra, analysis as follows:

In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court articulated the duties of trial counsel. The court stated that " . . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Accord *State v. Johnson* (1986), 24 Ohio St. 3d 87, 89. The court also observed that ". . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, supra, at 690. And, importantly, the Strickland court recognized the "distorting effects of hindsight" and warned against second-guessing as to counsel's assistance after a conviction. *Id.* at 689. For these reasons, the court must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and ". . . a court deciding an actual effectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . ." *Id.* at 690.

Here, appellant's trial counsel advised appellant that he should waive a jury trial because a police officer had recently been shot in Guernsey County and that would prevent him from obtaining a fair and impartial jury. Appellant claims that trial counsel, midway through voir dire, advised appellant that the attitudes of the perspective jurors had hardened from the killing of the police officer. Appellant claims that this demonstrated a lack of competent counsel because the killing of the police officer was unrelated to the instant case, none of

the prospective jurors during voir dire mentioned the policeman's death, none of the attorneys questioned the perspective jurors on the killing, and appellant's counsel did not renew a request to change venue.

Upon reviewing appellant's trial counsel's advice at the time it was given and the evidence against appellant, we find that the advice that appellant waive a jury trial was a plausible and reasonable strategic decision.

As stated in *State v. Clayton* (1980), 62 Ohio St. 2d 45, 49:

> Counsel chose the strategy that proved ineffective but that the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client.

> We cannot say that appellant's trial counsel failed to make a reasonable strategic choice faced with the evidence against appellant and his reading of a jury's attitude during vior dire.

Accordingly, we overrule this first assignment.

II

In his second assignment, appellant claims that he did not make a knowing, intelligent and voluntary plea of guilty to aggravated murder with a capital specification because such plea was entered only after appellant's counsel assured appellant that he would not receive the death penalty. We overrule this assignment because the record before us indicates that appellant was well aware, before his plea was accepted, of the possibility that the death penalty could still be imposed if he pled guilty.

Accordingly, this assignment of error is hereby overruled.

III

In his third assignment, appellant claims that appellant's trial counsel improperly induced the appellant's plea of guilty by indicating that he would not receive the death penalty upon entering the plea and such constituted ineffective assistance of counsel. We disagree.

As discussed above, appellant was sufficiently apprised before entering his plea that such a plea still carried the possibility of the death penalty. Accordingly, appellant has failed to demonstrate that his counsel's advice prejudiced him under the *Strickland*, supra, test.

Therefore, we overrule this assignment of error.

IV

Through this assignment appellant asks us to look with hindsight at the mitigation phase of this capital trial and conclude that appellant's counsel's performance was inadequate by what he did and did not present.

As pointed out in the attached judgment entry, counsel for appellant presented at the mitigating phase "fifteen people who were friends, family members and former teachers, evidence in the form of exhibits regarding [appellant's] Co-defendants, Clyde Daniel Wesley and Norman Edmonds, [appellant's] school records, and questionnaires submitted by members of [appellant's] community." Furthermore, appellant's counsel was able to show that "the greater weight of the evidence was that the [appellant] had been well-liked and well-adjusted."

The three judge panel also found that the mitigating circumstances of a lack of significant criminal history, and appellant's youth existed. However, the panel found that the aggravated circumstances outweighed the mitigating factors beyond a reasonable doubt.

Upon review of the record, and the documentary evidence submitted by appellant in this petition, we cannot say that appellant lacked a competent counsel at the mitigating phase.

The underlying theme/argument prevalent throughout this assignment, is that appellant's counsel selected the wrong theory or tactic at the mitigation phase. We find that this underlying theme/argument unequivocally fails to meet the two-pronged test of *Strickland*, supra. Accordingly, we overrule this assignment of error.

V

In his fifth assignment, appellant claims that he was denied effective assistance of counsel at the appellate stage of the proceedings by failing to raise other "numerous instances of error."

Assuming arguendo the trial court incorrectly concluded that ineffective assistance of appellate counsel is not cognizable generally in proceedings under R.C. 2953.21 in any case, we affirm the trial court's judgment in this case for different reasons. Under *Strickland*, the critical question for ineffective assistance of appellate counsel in a capital case is whether a reviewing court with reasonable probability would have come to a different result had appellant's appellate counsel raised other instances of error.

Assuming arguendo appellant's appellate counsel did not raise these other "numerous instances of error" on the

original appeal, we find that there is not a reasonable probability of a different appellate result had these other instances of error been presented.

Accordingly, the fifth assignment of error is overruled.

VI

We overrule this final assignment for there were no specific allegations, if true, which would justify the conclusion of ineffective assistance of counsel nor was there submitted evidentiary documents containing sufficient operative facts to demonstrate ineffective assistance of counsel so to require an evidentiary hearing thereon.

In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.

State v. Jackson (1980), 64 Ohio St. 2d 107, syllabus.

Accordingly, we overrule this assignment of error.

For the foregoing reasons, we affirm the judgment of the Court of Common Pleas of Guernsey County.

APPENDIX O

THE SUPREME COURT OF OHIO

	:	1990 TERM
	:	
	:	To wit: December 26, 1990
State of Ohio,	:	
Appellee,	:	Case No. 90-1816
	:	
v.	:	ENTRY
	:	
John David Stumpf,	:	
Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Guernsey County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by David Doughten.

(Court of Appeals No. 89CA50)

/s/ THOMAS J. MOYER
Chief Justice

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APPENDIX P

SUPREME COURT OF THE UNITED STATES

No. 90-7495

STUMPF, JOHN D., PETITIONER

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF OHIO
GUERNSEY COUNTY

November 12, 1991

JUDGES: Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas.

OPINION

The petition for writ of certiorari is denied.

APPENDIX Q

COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

ENTRY

STATE OF OHIO,
PLAINTIFF,

CASE NO. 9684

v.

November 27, 1989

JOHN DAVID STUMPF,
DEFENDANT(S).

FINAL APPEALABLE ORDER

This matter comes on for hearing before the Court on Defendant's Petition for Post-Conviction Relief, pursuant to Revised Code § 2953.21 and the State of Ohio's Motion for Summary Judgment and Defendant's Motion for Summary Judgment.

The Court has carefully reviewed the Defendant's Petition for Post-Conviction Relief, the supporting Affidavits, the Court file and the attached partial transcripts. Based on this review, the Court, applying the standard of Civil Rule 56, finds that the State of Ohio's Motion for Summary judgment should be granted, and Defendant's Motions for Summary Judgment and Petition to Vacate or Set Aside Sentence should be denied.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioner was indicted on May 14, 1984 for a violation of R.C. § 2903.01, Aggravated Murder of Mary Jane Stout, with accompanying specifications pursuant to R.C. § 2929.04(A)(3), (A)(5) and (A)(7); a violation of R.C. § 2903.01, Attempted Aggravated Murder of Norman Stout; and for violations of R.C. § 2911.01 and 2913.02, Aggravated Robbery and Theft.

2. Petitioner waived his right to a jury trial and elected to be tried by a three-judge panel.

3. On September 17, 1984, the Petitioner entered a guilty plea to the aggravated murder of Mary Jane Stout, and the specification that her murder was done to escape detention, apprehension, trial or punishment for aggravated robbery, and the attempted aggravated murder of Norman Stout. Petitioner also entered a guilty plea to the attempted aggravated murder of Norman Stout.

4. After hearing evidence, the three-judge panel accepted petitioner's pleas and found the Petitioner guilty.

5. The Court conducted a sentencing hearing at which Petitioner presented evidence from fifteen people who were friends, family members and former teachers, and evidence in the form of exhibits regarding Petitioner's Co-defendants, Clyde Daniel Wesley and Norman Edmonds, Petitioner's school records, and questionnaires submitted by members of Petitioner's community.

6. The greater weight of the evidence was that the Petitioner had been well-liked and well-adjusted. Petitioner had the ability to read and write, and the Petitioner worked hard and helped other people.

7. The thrust of the Petitioner's evidence was that the Petitioner was a "follower" and Wesley was the "leader."

8. The three-judge panel found that the mitigating circumstance of a lack of a significant criminal history existed.

9. The three-judge panel also found that the mitigating circumstance of the Defendant's youth existed.

10. The panel found that the aggravated circumstances outweighed the mitigating factors beyond a reasonable doubt and imposed the death penalty.

11. Petitioner filed a Motion for a New Trial, which the Trial Court overruled.

12. Petitioner appealed both his conviction and the Court overruling his Motion for New Trial.

13. On May 22, 1986, the Guernsey County Court of Appeals affirmed the conviction and sentence and upheld the Court's overruling the Motion for New Trial in *State v. John David Stumpf*, Case No. CA-760, CA-793.

14. The Ohio Supreme Court affirmed on August 19, 1987 in *State v. Stumpf* (1987), 32 Ohio St.3d 95.

15. Petitioner filed a Petition to Vacate Judgment pursuant to R.C. § 2953.21, alleging he had received the ineffective assistance of counsel at trial and on appeal.

16. The partial transcripts and pleadings of Petitioner's trial show that the Petitioner's trial counsel represented Petitioner diligently.

17. The partial transcripts and the standards of law to be applied show that Petitioner's counsel adequately investigated the facts in preparation for the sentencing hearing.

18. Decisions about which Petitioner complains were reasonable trial tactics, including but not limited to waiving the jury, choosing not to introduce cumulative evidence, and asking questions of witnesses.

19. Petitioner's Affidavits are cumulative of evidence presented to and considered by the three-judge panel (Transcript of Proceedings, September 17, 18, 19, 20, 21 and 24, 545, 419-421, 445, 479).

20. The Ohio Supreme Court has held in *State v. Stumpf, supra*, that evidence was properly presented and considered at the sentencing hearing.

21. Petitioner's counsel had no meritorious grounds for the objections Petitioner claims they should have made.

22. The Trial Court advised the Petitioner that the death penalty was a possible penalty.

23. The facts show the Petitioner to be of low, but normal, intelligence, capable of understanding that the death penalty was a potential punishment; and the facts show that this potential punishment was read to the Defendant by Judge Henderson.

CONCLUSIONS OF LAW

1. Only constitutional violations alleged to have occurred at trial may be raised in a post-conviction petition pursuant to R.C. § 2953.21.

2. Allegations of ineffective assistance of appellate counsel may not be raised in a post-conviction petition.

3. A defendant is entitled to post-conviction relief only if there was such a denial or infringement of the rights of the Defendant as to render his conviction void or voidable under the Ohio or United States Constitutions.

4. Petitioner received effective assistance of counsel.

5. Petitioner's Petition for post-Conviction Relief does not state grounds for relief. The judgment is neither void nor voidable.

It is therefore the Order of this Court that Defendant's Motions for Summary Judgment and Petition to Vacate or Set Aside Sentence pursuant to R.C. § 2953.21 are denied. It is the Order of the Court that the State of Ohio's Motion for Summary Judgment is hereby granted.

/s/David A. Ellwood
Judge of the Common Pleas Court
of Guernsey County, Ohio

cc: Prosecuting Attorney
Patricia Walsh & David Doughten, 1040 Standard Blvd., 1370 Ontario St., Cleveland, Ohio 44113

APPENDIX R

September 17, 1984 Transcript of Hearing on
Stumpf's Entering Guilty Plea

PROCEEDINGS

(Whereupon, on September 17, 1984, at 1:49 o'clock p.m., the following proceedings were had before the Court.)

JUDGE HENDERSON: Before I begin with the matter at hand, I would like to introduce those who are with me at the bench. I did hear the Bailiff very plainly recite our names, but possibly there might be some doubt as to which one's which.

I am John E. Henderson of Guernsey County and I have been selected to preside in this case. And seated on my right is Judge Warren Bettis of Columbiana County, who has been assigned here by the Supreme Court as one of the three Judge Court. And to my left is Judge Rice--Judge Raymond Rice of Tuscarawas County, retired Judge. He is also a part of the three Judge panel.

The case that is before us at this time is the case of The State of Ohio versus John David Stumpf. The case bears a number, Case Number 9684.

At this time I note present in court at the counsel table the Prosecuting Attorney of Guernsey County, Mr. James Scott and the Assistant Prosecuting Attorney, Keith Plummer. They represent the State of Ohio in this case. And at the rear counsel table representing the defendant is Attorney Craig Stephens of Ravenna and Attorney Lewis Tingle of Cambridge, Ohio, and the defendant is present at the counsel table.

This is a case that has been brought to the attention of this Court by reason of an Indictment. An Indictment which was filed in this Court in the May term of 1984 and it consists of five counts and to the first count, which is that of Aggravated Murder, are specifications, first, second, third and fourth specifications. Count two is a count alleging Attempted Aggravated Murder and then is a specification to the second count. Count three is a count alleging Aggravated Robbery with a specification thereto and Count four is a specification of Grand Theft Motor Vehicle and Count five is a count alleging Grand Theft of a firearm. Those are the matters which are at the present time before this Court.

By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by duty and elect to be tried by a three judge panel in the Court to which the case may be pending. I fully understand that under the laws of this State I have a Constitutional right to a trial by jury.

Gentlemen of Counsel for the defense, I would ask at this time is the entire case and all counts before the Court for consideration at this time?

MR. TINGLE: Yes, Your Honor, it is.

JUDGE HENDERSON: Thank you. I have been advised that the State of Ohio has a motion at this time which it wishes to present. Mr. Scott?

MR. SCOTT: If it please the Court, as the Court is aware, we have been conferring with defense counsel for

some time this morning or earlier today prior to these proceedings. I believe we have arrived at a negotiated plea situation and I wish to recite for the record the understanding that I have, subject to the concurrence and agreement of defense counsel as to the matters agreed upon, with the Court's permission.

JUDGE HENDERSON: You may proceed.

MR. SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was comitted for the purpose of escaping detection, apprehension, trial or punishment for other offenses--the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of--excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and

the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11 (C) (3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

That is my understanding of the arrangement that we are proposing to the Court at the present time.

JUDGE HENDERSON: Thank you, Mr. Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Mr. Tingle?

MR. TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.

JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to be asked, I'm going to ask that question now. Mr. Stumpf, do you affirmatively acknowledge this agreement?

MR. STEPHENS: Would you repeat the question for him, Your Honor?

JUDGE HENDERSON: Mr. Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well, you may he seated. Motion has been made by the Prosecutor---

MR. TINGLE: If the Court please, if I might interrupt. One matter that was not set forth in the statement of the Prosecuting Attorney, which I believe needs to be a matter of record at this time, the two specifications known as the gun specifications to count one, being specification number four and count two, the gun specification, I believe were to be stated by the Prosecuting Attorney to be the result of one transaction as part of our negotiations also.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: That is correct, Your Honor, within the meaning of Section 2929.71 the fourth specification or gun specification to the first count and the gun specification being the only specification to the second count, are to be treated as part of the same because both offenses were committed as part of the same transaction within the meaning of 2929.71 of the Code.

JUDGE HENDERSON: Mr. Tingle, are you satisfied then?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: I'm going to once again in the interest of caution, ask the defendant now that there has been a clarification of the agreement, I'm going to ask the

defendant again, Mr. Stumpf, do you affirmatively acknowledge this agreement between the Prosecuting Attorney and your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: There has been a motion made to amend the Indictment, specifically specification one to the first count by changing the word "another" to "other", the word "offense" to "offenses" and by adding at the end thereof of that specification to the first count the words "and Attempted Aggravated Murder". Do I state your amendments correctly, sir?

MR. SCOTT: Yes, Your Honor.

JUDGE HENDERSON: And I believe those were the only amendments that had been offered to the Indictment?

MR. SCOTT: That's correct.

JUDGE HENDERSON: Is there objection?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: Mr. Scott, I'm going to ask you then--I will grant your motion. I'll ask that you amend your Indictment by interlineation. You may take the Court's file to your counsel table.

MR. SCOTT: May I approach the bench, Your Honor?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: Let the record show that I have amended here in open court by interlineation to make the

changes as the Court has recited in the first specification the first count. Counsel have initialed and dated the change on the Indictment.

JUDGE HENDERSON: Could we have the defendant also, since he's being consulted on this matter?

MR. SCOTT: Let the record show that the defendant did initial on the margin the changes made by interlineation with the advice and assistance of his counsel and here in open court.

JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that questions be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?

MR. TINGLE: We have, Your Honor.

JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

MR.TINGLE: Yes, we have.

JUDGE HENDERSON: Are you willing that your client be sworn?

MR. TINGLE: To the extent of answering questions concerning his waiver of rights, yes, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, do you understand that you have a Constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything you say may be used against you and probably will be used against you, are you willing to waive your privilege against self-incrimination and be sworn to tell the truth concerning your understanding of your rights here in this court?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask at this time then that the Bailiff administer the oath to the defendant.

(Whereupon, John David Stumpf was sworn to tell the truth.)

JUDGE HENDERSON: Gentlemen of counsel, you may be seated.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel approached the bench and conferred with the Court out of the hearing of the Court. Reporter.) (Whereupon, counsel returned to their tables and the following proceedings were had before the Court.)

JUDGE HENDERSON: I think it would be appropriate that the defendant return to counsel table. Questions will be asked of him by the members of the judicial panel, but it is not necessary that he remain in the witness stand.

Mr. Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Mr. Stumpf, do you have any physical or mental health problems today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of alcohol or any medicine or drug today? Let's take it one at a time. Are you under the influence of alcohol today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of any medicine or drug today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being--to a sentence of twenty

years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the--under specification four to the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proven guilty beyond a reasonable doubt; the right to confront and to question the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you understand that you may be giving up those rights?

MR. STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

MR. STEPHENS: Yes, sir.

JUDGE HENDERSON: Thank you. Do you understand that if you have made any admission or confession or if any evidence against you was seized, you have the right to have a preliminary hearing on the admissibility thereof before you plead guilty or are brought to trial. Do you want such a

preliminary hearing or do you want the Court to accept your plea of guilty to the counts which your counsel has mentioned?

MR. STEPHENS: Your Honor, we have previously explained to the defendant that he has been afforded at one time an opportunity for a preliminary hearing. He understands that, he does not want any preliminary hearings prior to this plea.

MR. SCOTT: May I address the Court a moment?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: I think the record should reflect there was a timely motion filed to suppress certain evidence, particularly statements made by the defendant, that the Court has heard the evidence with respect to that motion and has heretofore denied the motion to suppress with regard to those matters.

JUDGE HENDERSON: Yes, sir. Anything further?

MR. SCOTT: Nothing further.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.

JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask you if you are in fact guilty of the charge set forth against you in Count two of the Indictment, which is Attempted Aggravated Murder, a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And I'm going to ask you and then I'll explain my question and give you an opportunity to answer. There is a specification to the second count, that of having a firearm on or about your person or under your control while committing the aforesaid offense of Attempted Aggravated Murder. I understand that by reason of the statement of the counsel for the State of Ohio that there are two specifications of a similar purport and that the two will be considered as one, but are you in fact guilty of this specification to the second count?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: The Court would at this time ask the defendant be seated. I'm going to ask that my associates here at the bench have an opportunity to ask such questions at this time as they desire and I'll ask Judge Bettis, is there anything that you desire?

JUDGE BETTIS: No questions.

JUDGE HENDERSON: Judge Rice?

JUDGE RICE: No questions.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: If the Court please, if the Court is inclined at this point after having made full inquiry of the defendant to accept the--to propose that the defendant actually enter the pleas as proposed and accept the pleas as proposed or as entered, then the State would at that time ask leave to nolle the remaining portions of the Indictment.

JUDGE HENDERSON: Before I get to that point, I would also ask counsel for the defense if there's anything further at this time?

MR. TINGLE: Not at this time, Your Honor.

MR. SCOTT: Could we approach the bench for a moment, Your Honor?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

JUDGE HENDERSON: It has been brought to the Court's attention, and properly so, that the matter of sentencing left to the discretion of the Court in this matter based upon the evidence that is presented and the evidence that is presented in mitigation of punishment and one thing that was not mentioned by this speaker is in the matter of punishment that it is possible that Count one and Count two could run consecutively or concurrently at the instance of the Court. And I want to ask the defendant if he understands that could be the case?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: You understand then that the matter of sentencing itself, within the frame work of the statute with regard to sentences to be imposed in such cases, rests then with this panel of Judges?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Thank you. You may be seated. Now, it is necessary in a capital case that, the Court

hear evidence so that it is satisfied that the offenses to which a plea of guilty is offered actually were committed by the defendant. I'm sure that everyone can understand the reason for that. This is a serious offense--offenses I should say, and this panel does not desire to have the defendant enter a plea of guilty and then the panel not be satisfied that the offense to which the plea of guilty was offered was actually committed by the defendant. So, there will be a proceeding, a trial if you will, as to the necessary elements to establish the guilt of the defendant, even though he offers a plea of guilty. I have asked the defendant if he is in fact guilty of those charges and I'm going to ask him in another form. The defendant has heretofore when he appeared before the Court entered pleas of not guilty to those offenses and I'm going to ask then if the defendant desires to withdraw his pleas of not guilty to the first count and specification one and four and to the second count with its specifications? Is it your desire after counseling with your attorneys to withdraw your pleas of not guilty to those offenses?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well. I'm going to ask you now, formally, how do you plead to Count one with specifications one and four?

THE DEFENDANT: Guilty.

JUDGE HENDERSON: How do you plead to Count two with specification?

THE DEFENDANT: Guilty, sir.

JUDGE HENDERSON: You may be seated. Where pleas of guilty are accepted and subject to the presentation of evidence the Court does find that your pleas have been made freely, understandingly and voluntarily with full knowledge of

the nature of the accusation and the consequences of the pleas and without undue influence, compulsion, duress or promise of leniency.

Mr. Scott, you had moved the Court to nolle certain pleas. I'm going to ask that you withhold that action until such time as we have had our evidentiary hearing.

MR. SCOTT: That's fine, Your Honor.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.) (Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

MR. SCOTT: Your Honor, consistent with the sidebar conference, I would at this time, as previously stated as part of the agreement here, move to nolle the remaining counts, which I believe are three, four and five and also the specifications two and three to the first count and request that the Court defer ruling on the motion to nolle until following the evidentiary hearing and the determination of the Court as to the degree of offense the factual basis for the plea of guilty to the first count which I believe is the only one the statute requires an evidentiary hearing upon that is the Aggravated Murder and ask that the Court defer ruling on the motion to nolle until that time.

JUDGE HENDERSON: Is there objection, gentlemen?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: The Court then will defer ruling upon the motion to nolle.

It is 2:30 and a little bit past that. It would seem appropriate to the Court that the Court recess until 9:00 o'clock tomorrow morning at which time the State of Ohio should be ready then to present evidence with regard to the matters set forth in the Indictment. Is that agreeable with counsel?

MR. SCOTT: For the State, yes, Your Honor.

JUDGE HENDERSON: The Defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: Then the Court should ask my fellow Judges, is that agreeable with you?

JUDGE BETTIS: Yes, sir.

JUDGE HENDERSON: And with you, sir?

JUDGE RICE: Agreeable, sir.

JUDGE HENDERSON: Then at this time, Mr. Bailiff, you may adjourn Court for the day.

(Whereupon, at 2:33 o'clock p.m. Court recessed to reconvene at 9 o'clock a.m., Sepember 18, 1984.)

APPENDIX S

INDICTMENT

THE STATE OF OHIO
COURT OF COMMON PLEAS

Guernsey County, ss:
Of the Term of May *in the year of our Lord,*
one thousand nine hundred and eighty—four (1984).

COUNT ONE:

The Jurors of the Grand Jury *of the State of Ohio, within and for the body* of *the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* John David Stumpf, R. D. 1, Box 41, Canonsburg, PA *on or about the* 14th *day of* May, 1984 *at the County of Guernsey aforesaid,*

did purposely cause the death of another person, to wit: Mary Jane Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, the offense of "Aggravated Robbery", in violation of Ohio Revised Code, Section 2903.01(B), entitled 'AGGRAVATED MURDER", and contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO THE FIRST COUNT:

The Grand Jurors further find and specify, under Ohio Revised Code, Section 2929.04(A) (3), in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above-named John

David Stumpf, to wit: "AGGRAVATED ROBBERY" [& ATTEMPTED AGGRAVATED MURDER (by interlineation).]

SPECIFICATION TWO TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04(A)(5) and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout.

SPECIFICATION THREE TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above-named John David Stumpf was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit the offense of AGGRAVATED ROBBERY", and further that the above-named John David Stumpf was the principal offender in the commission of the offense of "AGGRAVATED MURDER" as charged in the First Count.

SPECIFICATION FOUR TO THE FIRST COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT TWO:

County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct, which, if successful, would have constituted the offense of "Aggravated Murder", by then and there purposely attempting to cause the death of another person, to wit: Norman B. Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of "Aggravated Robbery", all being in violation of Ohio Revised Code, Section 2923 .02(A), entitled "ATTEMPTED AGGRAVATED MURDER" (Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE SECOND COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT THREE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code, Section 2913.01, to wit: the offense of "Grand Theft" of

property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense, did then and there have a deadly weapon, to wit: a firearm, on or about his person or under his control, in violation of Ohio Revised Code, Section 2911.01, entitled "AGGRAVATED ROBBERY" (Aggravated Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE THIRD COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT FOUR:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle, to wit: a 1976 Plymouth Sedan, Serial No. RH41G6A160499, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—MOTOR VEHICLES" (Felony in the Third Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT FIVE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Norman B. Stout, knowingly obtain or exert control over a certain firearm, to wit: a .357 caliber Smith and Wesson, Model 28-2, Serial Number N552178 hand gun, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—FIREARM" (Felony in the Fourth Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/J. R. Scott
Prosecuting Attorney

APPENDIX T

COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

STATE OF OHIO

Plaintiff CASE NO. 9684

VS

JOHN DAVID STUMPF MOTION

Defendant

Now comes the Defendant by his Attorneys Lewis N. Tingle and Craig Stephens and moves the Court for leave to withdraw his former plea of Guilty entered in the above case and setting this case for trial. In the alternative, the Defendant requests the Court to set aside the sentence imposed in this case and to order that a new sentencing (mitigation) proceeding be conducted.

/s/LEWIS M. TINGLE
Attorney for Defendant
138 North Seventh Street
Cambridge, OH 43725
(614) 439-7745

MEMORANDUM

This Court previously accepted a plea of Guilty from the Defendant and, following a hearing, imposed the Death Penalty upon the Defendant. At that time, a Co-Defendant was in custody in the State of Texas awaiting extradition to Ohio. This Co-Defendant, Clyde Daniel Wesley, was not

available to the Court or to the Defendant for testimony at that time. In fact, that Co-Defendant had made no statement to any law enforcement officer concerning the crimes for which the Defendant was charged and convicted.

Subsequent to this Defendant's sentencing, Clyde Daniel Wesley was returned to the State of Ohio and stood trial upon identical charges to that of the Defendant. Following that trial, Clyde Daniel Wesley was found Guilty of Aggravated Murder but received a sentence of life in prison with parole eligibility after twenty (20) years. During the course of that trial, the State produced a witness who testified as to conversations with Clyde Daniel Wesley while both were incarcerated in the Guernsey County Jail. This witness, James Eastman, testified that Clyde Daniel Wesley told him that he was the one who actually shot Mary Jane Stout. A copy the transcript of that testimony is attached hereto.

At the time of sentencing, this Court issued its separate Findings and specifically found that John David Stumpf was the principal offender in the shooting and killing of Mary Jane Stout. This testimony of James Eastman, which was not available to this Defendant at the time of sentencing, directly contradicts this finding of the Court. It is evidence which the Court should have available to it in determining the appropriate sentence to be imposed against John David Stumpf. It is of such a nature and importance that it warrants the withdrawal of the Guilty plea previously entered by this Defendant. At the very least, it is evidence which must be considered by the Court in determining the appropriate sentence to be imposed upon John David Stumpf. It is evidence which is material to the conduct of John David Stumpf and supports the evidence offered at the sentencing hearing that this Defendant was not the principal offender in

the crime charged. A review of that evidence indicates it has a high degree of credibility when analyzed with the other evidence available.

Respectfully submitted,

/s/LEWIS M. TINGLE

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Motion was served upon C. Keith Plummer, Prosecuting Attorney, 139 Courthouse Square, Cambridge, Ohio 43725, by placing the same in the United States Mail addressed to him this 7th day of June, 1985.

/s/LEWIS M. TINGLE

APPENDIX U

Excerpt from October 1, 1985 Transcript of Hearing on Stumpf's Motion to Withdraw his Guilty Plea

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MR. TINGLE: If the Court please, the motion which has been filed on behalf of the defendant requests in the alternative the withdrawal or leave to withdraw the plea of "guilty" previously entered by the defendant and in the alternative for a new hearing to be conducted concerning the penalty to be imposed against this defendant. In support of that motion, I believe the State of Ohio, the Prosecuting Attorney, will agree to a stipulation that the testimony adduced at the trial of Clyde Daniel Wesley by or from one James Eastman, Case #9692, and also the testimony of Clyde Daniel Wesley in that same case can be admitted for consideration of the Court as it relates to the motion filed by the defendant as the testimony in the entirety of both witnesses.

MR. SCOTT: Upon the representation of the Court Reporter that what Mr. Tingle has is, in fact, the entire testimony of Mr. Wesley and the entire testimony of the witness Eastman, I'll agree that it be stipulated that that is what it is and nothing more rather than bringing the Court Reporter to the stand and doing all those things. If she indicates to us that that is the complete transcript of those two people, I have no problem in putting it in.

JUDGE HENDERSON: Do I understand the stipulation is that the testimony of these two individuals, Clyde Daniel Wesley and Mr. Eastman, that may be received in evidence in this manner?

MR. SCOTT: As to that's what it is and nothing more, that that was the testimony as given in the Wesley case.

JUDGE HENDERSON: Very well.

MR. TINGLE: On that basis, I would offer Defendant's Exhibit "2" and "3" then.

JUDGE HENDERSON: And on that basis, those are admitted, "2" and "3".

MR. TINGLE: If the Court please, in support of the notion then that is the only testimony or physical evidence which will be offered in support of the motion. I would like to address the Court on the issue itself.

JUDGE HENDERSON: Very well.

MR. TINGLE: If the Court please, the basis upon which the motion is filed or brought to the Court's attention is the fact that at the time of sentencing, this Court, as required by law, issued a written finding; and part of that finding was or were the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The first of those items listed under number 1 that the Court finds beyond a reasonable doubt that the defendant was the principal offender in Count 1 of the indictment. The State of Ohio during the trial of Clyde Daniel Wesley, Case #9692, produced a witness by the name of James Eastman. To summarize briefly, Mr. Eastman had been a cell mate of Clyde Daniel Wesley while he was incarcerated in the Guernsey County Jail following his extradition from the State of Texas. It was the testimony of Mr. Eastman that during the course of their companionship in that cell, Mr. Wesley related to him the story of this crime and how it occurred. The testimony of Mr. Eastman, found on page 12 of that transcript of his testimony, does indicate, and

he stated directly, that as they were getting ready to leave, Wesley related to him he heard her moan, meaning Mrs. Stout, or cry out something, turned around and shot her again. Wesley said he went back and shot Mrs. Stout again. Put into the context of the entire testimony, the shooting of Mrs. Stout as related by Mr. Eastman, James Eastman, occurred in two phases. She was shot, they left the room, as they were leaving they heard her moan, she was shot again. Comparing that to the testimony of Clyde Daniel Wesley as offered at trial, that scenario is followed fairly closely. But when questioned about how James Eastman could have known these things or where he got his information, Mr. Wesley's explanation was that during the course of their companionship in that jail cell, he had a transcript of the case of "State versus John Stumpf" to use in his own trial preparation, that he discussed the case somewhat with Mr. Eastman and Mr. Eastman had access to that transcript and read the account in the transcript; thereby acquiring the knowledge that he testified to. The problem with Wesley's explanation is the fact that there is no account that matches that situation or that scenario in the transcript of John David Stumpf. There is no account which states Mrs. Stout was shot, they left the room, heard her moan, went back and shot her again. The only place that that appears is in the case of Clyde Daniel Wesley. It would have been impossible for Mr. Eastman to have acquired that knowledge from the transcript of John David Stumpf. It, therefore, follows that he must have acquired that knowledge from Clyde Daniel Wesley personally.

On that basis, it does indicate that the Courts finding that the defendant, John Stumpf, was the principal offender. In other words, the one who shot Mary Jane Stout is contradicted by the testimony of James Eastman, and the explanation of Clyde Daniel Wesley is not sufficient to contradict James Eastman's testimony. It's on that basis, then that we have filed this motion, brought it to the Court's attention, asking for the alternate forms of relief. Thank you.

JUDGE BETTIS: Well, you were counsel for Mr. Stumpf, and I'm sure he pled guilty, and I'm sure you reviewed the details of his plea with him many, many times. Both of you are very competent counsel, I heard you. At least, that's my view. Didn't you, Lew?

MR. TINGLE: Yes.

JUDGE BETTIS: How many hours did you spend with Mr. Stumpf in discussing the case with him before you pled him guilty?

MR. TINGLE: Quite a few, Your Honor. Accurately, I couldn't tell you, it was a substantial number.

JUDGE SETTIS: All right, thank you.

JUDGE HENDERSON: Mr. Scott.

MR. SCOTT: If the Court: please, I beleive we need to talk about two other things before we get to the substance of what Eastman had to say and what Wesley had to say. Initially, I think we need to look at Section 2945.36 which talks about a three judge panel in a death penalty case and what procedurally is necessary. As I mentioned earlier, the statute says that this Court can determine matters of law and fact by a majority decision. However, decisions regarding the guilt, or in this case, the imposition of the death penalty, must be unanimous. With that in mind, I think we need to look at what the defendant is asking by means of this motion. Initially, the defendant is asking for a withdrawal of the previous plea of "guilty". It seems to me that is a matter of law and does not go to the question of the imposition of the death penalty nor to the question of guilt. And that can be initially, I believe, determined by the remaining two judges in this panel, being a majority of the original panel. As far as the

merits of that motion, there is no indication as the Court has inquired that Mr. Stumpf was not fully aware of what he was doing when he entered the plea of "guilty". It was, if you'll recall, a negotiated plea wherein he entered a plea of "guilty" to certain counts and to certain specifications to those counts in return for the State dismissing certain other counts or certain other specifications. I believe in our memorandum in opposition to the motion we cite the provision of Criminal Rule (3) which states that a motion to withdraw a "guilty plea is directed to the sound discretion of the Court. And I'll quote, "A motion to withdraw a plea of 'guilty' or 'no contest' may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea". We cite a case or two in here which indicates that if the defendant knew what he was doing and in the absence of coercion or mistake or something of that nature which casts doubt on the voluntariness of it or whatever, the motion should be denied. We heard nothing from the defense in this case in support of this motion to indicate that the defendant was anything than fully informed and that he intelligently made the decision with the assistance of his counsel after having everything explained to him that pertains to this plea of "guilty" and that he agreed and that the "guilty" plea proceedings were, in fact, undertaken and the inquiries of the Court made at that time, which I believe is all a matter of record in this case.

So, therefore, I think that the initial motion by the defendant to withdraw the "guilty" plea should be denied because there's been nothing shown to the Court to justify doing anything else.

With regard to the other alternative relief requested by the motion, it is tantamount to a motion for a new trial, at least in part, with regard to the sentencing phase of the former trial.

The Court, having following the plea of "guilty", heard the evidence and found the defendant "guilty" of the offense, guilty of the specifications by unanimous decision of the three judge panel. There is no reason to disturb that finding because of the fact that this is not a case where the trial proceeded on a "not guilty" plea; but the defendant admitted in open Court, as we cite in our memorandum, that there is nothing more solemn or whatever than a plea of "guilty" where he admitted that he did, in fact, purposely kill Mary Jane Stout and pleaded "guilty" to certain of those specification. It seems to me that in order to determine this part of the motion, the State would take the position that the remaining two judges can handle that as well because it is not a matter at this point directly dealing with the imposition of the death penalty nor is it a matter dealing with guilt, the finding of guilt. It is a question or a request to vacate the former sentence which would be a matter of law, arguably at least. The is very little, if any, authority that I could find on this exact problem where we don't have an intact panel left, but it would be our position that the two remaining judges can make that decision because it is a matter of law. And whether or not the Court feels that the presence of the witness Eastman is necessary in order to do that or whether the Court can read the record and determine from the record of his, testimony in the Wesley case, is a matter for the Court to determine. I would hasten to go on and say that although the Court did in it's unanimous opinion setting forth the reasons why the aggravating circumstances outweighed the mitigating circumstances shown, did make a finding that the defendant, Stumpf, was the principal offender in the case, that finding was not necessary under the specifications to which the defendant entered his plea. That even if the Court found that the defendant was an aider and abettor or even if the evidence showed that the defendant was an aider and abettor under those specifications, the death penalty still can be imposed. The question really before the Court is whether or not the information provided now to the Court would change the Court's finding because

the evidence is in conflict on the point; that is, that Mr. Wesley testified at his own trial, and the Court has that testimony that he did not fire the fatal shot. Eastman's testimony was as to a conversation with Wesley which occurred long after the Stumpf trial had been concluded. The circumstantial evidence, the ballistics evidence certainly supports the Court's original finding that Stumpf was the—in effect, the shooter or the principal offender.

Now, it would seem to me the Court's first determination would be as to whether or not this new information, being the testimony of Wesley and the testimony of Eastman, is sufficient to change the Court's opinion as to whether or not the evidence still showed or did not show that Stumpf was the principal offender. And if the Court should then conclude that the evidence now, the newly discovered evidence if you will, does change the picture to the point where that finding is not proper, whether or not that makes any difference; nevertheless, on the imposition of the death penalty--

JUDGE BETTIS: Of course Mr. Scott, pardon me for interrupting, but if we had not, been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

MR. SCOTT: That's right. I think the first decision this Court would have to make is whether or not this additional information changes the picture as to that finding that was previously made. And if it does, does that, in turn, change the appropriateness of the death penalty in this case in the judgment of the Court?

JUDGE BETTIS: Let me follow that up. My recollection was that Wesley was in jail in Texas at the time of the Stumpf trial.

MR. SCOTT: That's correct, sir.

JUDGE BETTIS: You were aware of that, were you not, Mr. Scott?

MR. SCOTT: Yes, I knew of that.

JUDGE BETTIS: And you were aware of it too?

MR. SCOTT: Everybody was aware of it.

JUDGE BETTIS: There wasn't anything to prevent either the State or the defense from talking to Mr. Wesley. Now, as a practical matter, he probably wasn't going to have very much to say to anybody; but you didn't ask him, did you?

MR. TINGLE: The defense did not, no, Your Honor.

JUDGE BETTIS: Or anyone on behalf of the defense. He was never asked by anybody, so he was available?

MR. SCOTT: I believe that's correct, yes, Your Honor.

JUDGE BETTIS: We knew he was in Texas, defense knew that.

MR. TINGLE: He was fighting extradition:. Though, as far as availability for trial, he was not available.

JUDGE BETTIS: You and I know as a practical matter he probably wasn't going to give you the time of day if you

went down. But the point is, you never asked him what he did in relation to Mrs. Stout or anybody else, did you?

MR. TINGLE: I think the prosecution was in Texas at that time during the period he was fighting extradition. What transpired between them and Wesley and Wesley's counsel in Texas I'm not privy to.

JUDGE BETTIS: Okay, but you didn't.

MR. SCOTT: I can tell you, but there's no record on it.

JUDGE BETTIS: Let me follow up. No one for the defense asked Mr. Wesley; and at least at this point, all we have is verbiage, it's not evidence. We have verbiage, we have a statement by Mr. Tingle that this is what Wesley would do, and we have a letter allegedly signed by Mr. Stout. So is there any evidence from anybody?

MR. SCOTT: I have nothing to present, Your Honor.

JUDGE BETTIS: In the record so far that, in fact, Wesley was the trigger man.

MR. TINGLE: Eastman's testimony, Your Honor. At Wesley's trial.

JUDGE BETTIS: Okay. And isn't there some---don't we have some right to read that and determine whether that is, in fact, credible testimony?

MR. TINGLE: Very definitely, Your Honor.

JUDGE BETTIS: I haven't read it. I'm certainly going to take the privilege to do so.

MR. TINGLE: And compared also against Wesley's testimony.

JUDGE BETTIS: I'm going to read both Eastman and Wesley because I didn't have the privilege of hearing that testimony.

MR. SCOTT: If it's appropriate, I can tell you what happened in Texas when I talked to his Texas lawyer.

JUDGE HENDERSON: I don't believe that's necessary at this time. We're hearing the matter of Eastman at this time, and we're not hearing the motion which has not been made yet.

MR. SCOTT: The inquiry was made, and I have an answer. But if you don't want to hear it at this point, that's fine.

JUDGE BETTIS: It's a motion of the defendant, not the State.

MR. SCOTT: But I have nothing other to say than it seems to me I don't presume to advise this Court how to proceed. We are under a set of circumstances, which to my knowledge, has not occurred under our present set-up with regard to capital cases. It seems to me the Court must first look at what you have on the record there that was presented today to determine if you can determine from that alone whether or not Eastman's testimony is of sufficient credibility to warrant further consideration or whether you need to hear testimony from Eastman live. It seems to me that's the first thing you need to consider and once you have made that determination as to whether or not a new trial is warranted on the basis of that evidence. I believe that this Court procedurally--this Court can proceed with the two remaining members of the panel because we are not dealing directly with

the imposition of the death penalty nor directly with the adjudication of guilt. We are dealing with a matter of law as to whether or not the previously imposed sentence shall be vacated. Thank you.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Nothing further, Your Honor.

JUDGE HENDERSON: We'll take this matter under advisement. The Court is going to, so that they don't get lost, is going to present two items: the letter from Mr. Damiani, Supreme Court, which I think all counsel have received a copy and also the judgment entry of the Court of Appeals which remands this case, if necessary. I believe it says for the purpose of the determination of any and all motions now, parenthesis, then pending before it. Those two matters, I believe, we'll just have them put into the record.

Anything further? We'll take this matter under advisement.

(Whereupon, at 3:17 o'clock p.m. the foregoing proceedings were terminated.)

APPENDIX V

IN THE COURT OF COMMON PLEAS

GUERNSEY COUNTY, OHIO

STATE OF OHIO,	:	
		CASE NUMBER 9684
PLAINTIFF,	:	
		JUDGMENT ENTRY
v.	:	
JOHN DAVID STUMPF,	:	
DEFENDANT.	:	

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Date of Entry October 2, 1985

Motion of Defendant filed June 7, 1985 was heard before Judge Henderson and Judge Bettis on October 1, 1985. Defendant's Exhibits 1, 2, and 3 were offered in evidence. Plaintiff stated it had no objection to No. 1 and no objection to No. 2 and No. 3 as being transcripts of Eastman and Wesley. Counsel for Defendant and State of Ohio made statements on record. The Court took the matter under advisement and after having considered the same, does overrule the Motion to Withdraw Former Plea and the Alternative Motion to Set Aside the Sentence Imposed.

cc: Prosecuting Attorney
Lewis M. Tingle

/s/JOHN E. HENDERSON, JUDGE
/s/J. WAREN BETTIS, JUDGE